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FIRST REPORT  
OF THE  
COMMISSIONERS  
IN  
PRACTICE AND PLEADINGS.

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# REPORT.

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## TO THE LEGISLATURE OF THE STATE OF NEW-YORK.

The Commissioners on Practice and Pleadings, beg leave to present their first report.

The general duties imposed upon the Commissioners, are declared by the twenty-fourth section of the sixth article of the Constitution, which requires the Legislature, at its first session after the adoption of the Constitution, to "provide for the appointment of three Commissioners, whose duty it shall be, to revise, reform, simplify and abridge the rules and practice, pleadings, forms and proceedings of the courts of record of this State; and to report thereon to the Legislature, subject to their adoption and modification from time to time."

In the act which was thereupon passed, creating the commission, the duties of the Commissioners are more explicitly defined; the eighth section declaring that they shall "provide for the abolition of the present forms of actions and pleadings in cases at common law; for a uniform course of proceeding in all cases, whether of legal or equitable cognizance, and for the abandonment of all Latin and other foreign tongues, so far as the same shall by them be deemed practicable, and of any form or proceeding not necessary to ascertain or preserve the rights of the parties."

The present report is designed to accomplish this reform, so far as the subjects embraced in it are concerned, and so far, also, as a careful examination of the important subject committed to their hands, and a due regard to the responsibility under which they act, have as yet enabled them to submit in detail any portion of their labors for the action of the Legislature.

To say that the reforms thus enjoined upon them were such as their own judgment approved, is but to repeat what is already known to the Legislature. In accordance with their own convictions, and in the spirit of the law, they have prepared the portion of the system which is now submitted. Though compressed within a narrow compass, it reaches far, and sweeps away the needless distinctions, the scholastic subtleties, and the dead forms which have disfigured and encumbered our jurisprudence. If the performance be equal to the intention, they will have relieved justice from many of her shackles, and opened the way for a thorough reform of remedial law in all its departments.

As will be perceived, the present is but a report in part. It relates only to the proceedings and pleadings in civil actions, and to such changes in the jurisdiction and functions of the courts, as seemed necessary to develop and bring into successful operation, the important reforms which have constituted the chief object of the present labors of the Commissioners.

The magnitude of the task which yet remains for them to perform, can scarcely be understood, but by those who have made the law their study. It is sufficient to say, that under the constitution and the statute, the commissioners see no other limit to their duty, than to make full provision for every proceeding in the judicial tribunals from the beginning to the end of every controversy. The courts of justice, and all their officers, the time within which actions must be commenced, the mode of bringing the parties before the court, their respective allegations, the trial of disputed questions of fact and of law, the summoning of witnesses, and the manner of their exa-

mination, including the question of their competency and the rules of evidence, the judgment to be rendered, the execution of the judgment, and appeals, together with the immense mass of special proceedings known to our law, prerogative and remedial writs, arbitrations, the processes against absent and insolvent debtors, and a revision of the practice, pleadings and proceedings in criminal cases, all appear to be embraced in the comprehensive language of the Constitution. Acting upon this view, it is the design of the Commissioners to prepare a code of procedure which shall comprehend the whole law of the State, concerning remedies in the courts of justice.

The result of their labors thus far, is before the Legislature. They will proceed to execute the remainder of their work, with as much rapidity, as the nature of the service, the care with which it should be performed, and their own strength will allow; asking in advance, and confident of receiving the indulgence and co-operation of the Legislaturc.

It will be perceived that the present report relates chiefly to actions hereafter commenced, it being thought indispensable to keep the old and the new systems of practice distinct. It is the purpose of the Commissioners to submit, as soon as possible, a temporary act, designed to facilitate the despatch of the business now pending in the courts.

With a view to anticipate, as far as possible, objections which may be made to any portion of the work, the Commissioners have inserted many notes, more, perhaps, and longer, than may by some be thought necessary, but which it was supposed might serve to furnish explanations, and answer arguments against the adoption of the reforms proposed.

All which is respectfully submitted.

ARPHAXED LOOMIS,  
DAVID GRAHAM,  
DAVID DUDLEY FIELD.

*Albany, Feb. 29, 1848.*

# CODE OF PROCEDURE.



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# AN ACT

To Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State.

---

WHEREAS, it is expedient, that the present forms of actions and pleadings in cases at common law should be abolished, that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceeding, in all cases, should be established ; Therefore,

*The People of the State of New-York, represented in Senate and Assembly, do enact as follows :*

## GENERAL DEFINITIONS AND DIVISIONS.

### SECTION 1. Division of remedies.

2. Definition of an action.
3. Definition of a special proceeding.
4. Division of actions, into civil and criminal.
5. Definition of a criminal action.
6. Definition of a civil action.
7. Civil and criminal remedies, not merged in each other.
8. Subjects embraced in this act.

These general definitions and divisions are intended to explain and limit the present act, and to show what relation it bears to the entire code of procedure. It will be per-

ceived, that the part relating to civil actions is nearly complete, with the exception of the portions concerning witnesses and the rules of evidence. The part relating to the courts and their jurisdiction, will be enlarged, so as to embrace the whole subject of their organization and jurisdiction, and the functions and duties of judicial officers, including sheriffs, coroners, jurors, referees and clerks. The parts relating to criminal actions, and to special proceedings, including arbitrations, *habeas corpus*, the discharge of insolvent or imprisoned debtors, the processes against absent or absconding debtors, and the enforcement of the liens of mechanics and material men, will be the subject of future reports.

The second part, now reported, it will be borne in mind, relates only to actions hereafter commenced. The difference between the present system and the former, is so radical, that there would be much difficulty in carrying on an action commenced under the old system, according to the new. We have thought it better, therefore, to keep the two distinct. The temporary act, which we shall recommend, will provide for actions now pending.

§ 1. Remedies in the courts of justice are divided into,

1. Actions, and
2. Special proceedings.

§ 2. An action is a regular judicial proceeding, in which a party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence.

§ 3. Every other remedy is a special proceeding.

§ 4. Actions are of two kinds :

1. Civil, and
2. Criminal.

§ 5. A criminal action is prosecuted by the state, as a party, against a person charged with a public offence, for the punishment thereof.

§ 6. Every other is a civil action.

§ 7. Where the violation of a right admits of both a civil and criminal remedy, the right to prosecute the one is not merged in the other.

§ 8. This act is divided into two parts.

The first relates to the courts of justice, and their jurisdiction.

The second relates to civil actions commenced in the courts of this state after this act shall take effect, and is distributed into twelve titles. The first four relate to actions in all the courts of the state, and the others, to actions in the supreme court, in the county courts, in the superior court of the city of New-York, in the court of common pleas for the city and county of New-York, in the mayors' courts of the cities of Albany, Hudson, Troy and Rochester, and in the recorders' courts in the cities of Buffalo and Utica; and to appeals to the court of appeals, to the supreme court, to the county courts, and to the superior court of the city of New-York.

§ 2. A criminal action is prosecuted by the state, as a party, against a person charged with a public offence, for the punishment thereof.

§ 3. Every other is a civil action.

§ 4. Where the relation of a right exists of both a civil and a criminal remedy, the right to prosecute the one is not impaired by the other.

§ 5. This act is divided into two parts.  
The first relates to the courts of justice, and then  
the second relates to the officers thereof.

The second relates to all persons hereafter coming into the courts of this state, and is distributed into twelve titles. The first title relates to actions in all the courts of the state, and the others to actions in the superior court, in the county courts, in the superior court of the city of New York, in the court of common pleas for the city and county of New York, in the mayors' courts of the cities of Albany, Elizabeth, Troy and Rochester, and in the recorder's courts in the cities of Buffalo and Utica, and to appeals to the court of appeals, to the supreme court, to the county courts, and to the superior court of the city of New York.

# PART I.

---

## OF THE COURTS OF JUSTICE, AND THEIR JURISDICTION.

---

**TITLE I. Of the Courts, in general.**

**II. Of the Court of Appeals.**

**III. Of the Supreme Court; Circuit Courts; and Courts of Oyer and Terminer.**

**IV. Of the County Courts.**

**V. Of the Superior Court, and Court of Common Pleas in the City of New-York, and the Mayors' and Recorders' Courts in other cities.**

**VI. Of the Courts of Justices of the Peace.**

**VII. Of Justices's and other Inferior Courts in cities.**

The subjects treated of in this Part, and embraced in the Titles above enumerated, are now presented, so far only, as is necessary to render the practical arrangement of the jurisdiction of the courts consistent with the reforms subsequently proposed. It has been, from the first, our intention, carefully to collate all the provisions, whether constitutional or statutory, organizing the courts, and defining their jurisdiction, and to bring them together in a simple and convenient order of arrangement. The necessity of such a course has arisen from the fact, that in the haste which necessarily attended the action of the legislature, in bringing into operation a new and untried judiciary system, a sufficient opportunity was not afforded, for as complete and thorough an arrangement of the subject, as, under other circumstances, its importance would have demanded. It will

readily be perceived, however, that in organizing the government of the state, under a fundamental law, the leading principles of which were new, as they affected all its departments, little more could be expected of the legislature, at the outset, than that they should provide such laws as would prevent a failure of any of the functions of the government; and that, as a consequence, much must be left to subsequent legislation. To no department does this remark more forcibly apply, than to the judiciary. Its whole structure had been changed by the new organic law; jurisdictions, which had been, until then, entirely distinct, had been blended; the former courts had been almost wholly swept away; and new modes of procedure, resting upon principles hitherto unknown, had been prescribed by the constitution. It is not surprising, therefore, that in the act organizing the judiciary, which was passed by the legislature, under the pressure of a necessity, either on the one hand to adopt it in a form not entirely perfect, or on the other, to leave the State without a judiciary, it should not have been even attempted to prescribe the jurisdiction and functions of the new courts, with precision. And it is, probably, for this reason, that nothing more seems to have been contemplated in that act, than to present a series of enactments, under which the new courts could be set in motion, leaving their powers and jurisdiction, as well as the manner in which they were to be exercised, to be gathered, in a great degree, from a reference to former legislation.

Whether this be so or not, the result has been, that a very disproportionate share of the time of the courts has been occupied in the discussion of the provisions defining their powers; and that as a necessary consequence, a diversity of opinion among the judges, and a feeling of distrust among the community, have arisen, well adapted, unless the cause be promptly removed, to sap public confidence in the judicial establishment itself. The remark is by no means uncommon, that the new system cannot be brought into working order; and it is with no concealed gratification, that its enemies have regarded the difficulties surrounding it, as the sure precursor of its speedy dissolution. Believing, as we do, that the new system will, if fairly

tested, be found to be a great improvement upon that which preceded it, we have applied ourselves to the task of ascertaining the causes of the difficulties which now impede its progress; and are fully satisfied, that they lie no deeper than the necessarily general and imperfect character of the legislation to which we have referred. Under this conviction, we have devoted much time to devising a system of enactments, by which the jurisdiction of the courts shall be clearly presented, and to such an arrangement of the means afforded them for the performance of their duties, as will render the administration of justice prompt and efficient. We have done so, because we are compelled to admit, that, without it, we should utterly despair of the attempt to render any reform in legal procedure, (however, in other respects, simple and desirable,) of real benefit to the people.

To sustain the correctness of these observations, we need only refer to the legislation in respect to the jurisdiction of the supreme court. It is provided by the judiciary act, that, "the supreme court organized by this act, shall possess the same powers and exercise the same jurisdiction, as is now possessed and exercised by the present supreme court and court of chancery;" and that "all laws relating to the present supreme court and court of chancery, or any court held by any vice-chancellor, and the jurisdiction, powers and duties of said courts, the proceedings therein and the officers thereof, their powers and duties, shall be applicable to the supreme court organized by this act, the powers and duties thereof, the proceedings therein, and the officers thereof, their powers and duties, so far as the same can be so applied, and are consistent with the constitution, and the provisions of this act." (1 *Laws of* 1847, p. 323, sec. 16.) By reference to the Revised Statutes, it will be seen, that, the supreme court shall possess the powers and exercise the jurisdiction which belonged to the supreme court of the colony of New-York, with the exceptions, limitations and additions created and imposed by the constitution and laws of this state;" (2 *R. S.* 3d ed., 259, sec. 1,) and that "the powers and jurisdiction of the court of chancery

are co-extensive with the powers and jurisdiction of the court of chancery in England, with the exceptions, additions and limitations created and imposed by the constitution and laws of this state." (2 R. S. 3d., ed. 234, sec. 60.)

But while we have been assiduously engaged in maturing this, as well as other portions of our system, we have felt that it was due, alike to the anxiety of the people and to the expressed desire of the legislature, that we should, at as early a day as possible, present such portions of the proposed reforms in remedial law, as could be, at once, safely and conveniently reduced to practice. It has been already remarked, that the report now presented is mainly designed to carry out the abolition of the distinction between suits at law and in equity, and between the existing forms of actions at law, and to introduce a system of pleading, trial and judgment, having for its object the statement of the grounds of action and defence, in clear and unambiguous language, and the application of the rules of law to each particular case, divested of the technicalities and subtleties which constitute, alike the chief merit and the prominent evil of the existing system.

While we have kept this object steadily in view, we have found it necessary to survey the whole subject committed to us, and to introduce provisions bearing upon a variety of subjects necessarily interwoven with that to which we have referred. Among these, is a revision, in part, of the laws regulating the jurisdiction and functions of the courts.

That jurisdiction, as at present declared, so far as the original powers of all except the supreme court are concerned, is made to depend, in almost every instance, either upon the existing forms of action, or upon the distinctions on which they have given rise. And it will be seen by the provisions contained in this part, and the explanations which accompany them, that we have, in this respect, taken abundant care to avoid every source of embarrassment, which might otherwise result from the introduction of the more essential principles of this report.

In connection with this subject, also, while we have regarded our labors in this respect as rather secondary to the present purpose, we have not felt at liberty to overlook other defects in the existing judiciary system, which have occurred to us in the course of our investigations, and upon which we present, what we deem necessary and essential enactments. Their character, and the reasons for presenting them, need not here be anticipated, but will be found in the provisions themselves, and in the explanations with which they are accompanied.

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## TITLE I.

### Of the courts, in general.

SECTION 9. The several courts of this state.  
10. Their jurisdiction generally.

§ 9. The following are the courts of justice of this state :

1. The court for the trial of impeachments.
2. The court of appeals.
3. The supreme court.
4. The circuit courts.
5. The courts of oyer and terminer.
6. The county courts.
7. The courts of general sessions of the peace.
8. The courts of special sessions.
9. The surrogates' courts
10. The courts of justices of the peace
11. The superior court of the city of New-York,
12. The court of common pleas for the city and county of New-York.

13. The mayors' courts of the cities of Albany, Hudson, Troy and Rochester.
14. The recorders' courts of the cities of Buffalo and Utica.
15. The marine court of the city of New-York.
16. The assistant justices courts in the city of New-York.
17. The municipal court of the city of Brooklyn.
18. The justices' courts of the cities of Albany, Troy and Hudson.
19. The police courts.

The above enumeration of the courts of this state, which has been deemed useful, (as presenting, at one view, the entire judicial establishment,) embraces the general courts of the state, according to their jurisdiction, within the first ten subdivisions, and the local courts in cities, within the remaining nine subdivisions.

This section, it will be observed, merely declares the courts now existing; and is, so far as the local courts are concerned, in conformity with the provision of the constitution, that they "shall remain, until otherwise directed by the legislature, with their present powers and jurisdictions." (*Const., art. 14, sec. 12.*) In our future report upon this subject, we shall probably recommend an uniformity in the style of those courts, as well as in their jurisdiction. For the present, we have not considered it necessary to do so, except in reference to their jurisdiction, as hereafter defined; in which, as far as practicable, we have endeavored to assimilate them to each other.

§ 10. These courts shall continue to exercise the jurisdiction now vested in them respectively, except as otherwise prescribed by this act.

## TITLE II.

### Of the Court of Appeals.

**SECTION 11.** Its jurisdiction.

12. May reverse, affirm or modify judgment or order appealed from.

13. Terms of the court.

14. Concurrence of five judges, necessary to a judgment.

§ 11. The court of appeals shall have exclusive jurisdiction to review, upon appeal, every actual determination hereafter made, at a general term, by the supreme court, by the superior court of the city of New-York, or by the court of common pleas for the city and county of New-York, in the following cases, and no other:

1. In a judgment in an action commenced therein, or brought there from another court; and upon the appeal from such judgment, to review any intermediate order involving the merits, and necessarily affecting the judgment.

2. In a final order, affecting a substantial right, made in a special proceeding, or upon a summary application in an action, after judgment:

But such appeal shall not be allowed in an action originally commenced in a court of a justice of the peace, or in the marine court of the city of New-York, or in an assistant justice's court of that city, or in the municipal court of the city of Brooklyn, or in a justice's court of the cities of Albany, Troy and Hudson, respectively.

The powers of this court, which is exclusively a court of appeal, and that, so far as the state courts are concerned, of the last resort, are not defined by the constitution, which were-

ly provides for its creation, without designating its jurisdiction. (*Const., art. 6, sec. 2.*) This has been supplied by the judiciary act of May last, which, in this respect, is a transcript of the statute defining the jurisdiction of the court for the correction of errors. By that act, it is invested with full power to correct and redress all errors that have happened, or may happen, in the late supreme court and court of chancery, and in the present supreme court; and to examine all errors that shall be assigned or found in any record brought from the late or present supreme court, or in any process or proceeding touching the same, and to reverse or affirm any such judgment, or give such other judgment as the law may require; to which express declaration of its jurisdiction is added, the usual conclusion, that, "all laws relating to the court for the correction of errors, the jurisdiction, powers and duties thereof, the proceedings therein, and the officers thereof, and their powers and duties, shall be applicable to the court of appeals organized by this act, the jurisdiction, powers and duties thereof, the proceedings therein and the officers thereof, and their powers and duties, so far as the same can be so applied, and are consistent with the constitution, and the provisions of this act." (1 *Laws of 1847, p. 321, sec. 8, 10.*) And by the amendments to the judiciary act, which were adopted in December last, writs of error may now be issued from the court of appeals, to review the judgments of the superior court and common pleas in the city of New-York, in all cases where the judgment shall exceed one thousand dollars, exclusive of costs, and in dower, partition, and ejectment; (2 *Laws of 1847, p. 639, sec. 3;*) and the same power is conferred upon the court of appeals, in respect to the orders and decrees of the New-York superior court and common pleas, in equity cases, made at general term. (*Ibid. 642, sec. 23.*) By another section, also, of the same act, it is provided that "in any action at law, when a decision shall be made by the supreme court of this state, or by the justices of the late supreme court, upon a bill of exceptions, either in granting or refusing to grant a new trial, any party to such action, conceiving himself aggrieved thereby, may appeal from such decision, to the court of appeals, at any time within forty

days after the service upon his attorney of a copy of the rule or order granting or refusing to grant such new trial." (*Ibid.* p. 639, sec. 5.)

Under the old system, there was no question which presented so many embarrassments, and led to so much diversity of opinion in the court itself, as that which related to the jurisdiction conferred upon the court of errors, by the same phraseology as that which professes to define the jurisdiction of the court of appeals. And it is a singular fact, that the extent of the jurisdiction conferred by the terms thus used, has never yet been brought within the range of a convenient and tangible rule. We look in vain for such a test, to the language of the statute itself; and we are not much relieved from the obscurity of its provisions, when we resort to the judicial constructions it has undergone.

In reference to writs of error to the supreme court, for example, it was at one time laid down as the rule, that when a decision took place in that court which was final, and of which a record could be made, and which decided the rights of property or personal liberty, the statute gave the right of review.

This was determined in the memorable case of *Yates v. The People*, 6 Johns. 337, which came up on a writ of error, from the supreme court, for refusing to allow a *habeas corpus*; and where, after a very full and elaborate discussion, the right to a writ of error was established by a vote of 16 to 12; the affirmative of the proposition being sustained by Justices *Yates* and *Spencer*, and Senator *Clinton*, and the negative by Chancellor *Lansing*, Chief Justice *Kent*, Justices *Van Ness*, *Thompson* and *Platt*, and Senators *Paris* and *Williams*.

In another case, which arose soon afterwards, (*Clason v. Shotwell*, 12 Johns. 31,) where, on an indictment for a forcible entry and detainer, no return could be obtained to a *certiorari*, by reason of the death of the justice before whom the proceedings were had, and the supreme court investigated the case on affidavits, and awarded a restitution, it was held, that the court of errors might, on writ of error, review the proceedings on

the evidence presented in the court below. It was deemed immaterial, whether the decision complained of were denominated a judgment, an order, an award, a decree, or a sentence; and that it was enough, to entitle the party to a review, that the proceedings had all the essential characteristics of a suit, and that the court had closed the litigation by a definitive decision between the parties. And it was affirmed by Senator *Sanford*, who delivered the prevailing opinion of the court of errors, (which was sustained, 17 to 5,) that "all causes determined in the supreme court, whatever may be the course or mode of proceeding by which they may be conducted or determined, are subject to the appellate jurisdiction of this court."

It was attempted in *Brooks v. Hunt*, 17 Johns. 484, to apply this principle to a review of a decision of the supreme court, denying a motion to set aside an execution against a party who had been discharged from his debts, and which, in effect, finally determined his liability to pay the judgment; and yet the court of errors, with but two dissenting voices, quashed the writ of error, on the ground that it was not a final determination, but only a decision upon a collateral or interlocutory point.

Following up this distinction, it was held in a later case, (*Matter of Negus*, 10 Wend. 24,) that a writ of error did not lie, upon the refusal of the supreme court to set aside the decision of trustees under the statute relative to absconding debtors, upon an allegation of error in deciding upon the adjustment of the demands due the creditors of the absconding debtor. It was contended by senator *Tracy*, (who delivered a dissenting opinion,) that such decisions by the supreme court was a final determination, within the principle of the previous cases; but this view was overruled by the rest of the court, for various reasons, and among others, that error did not lie, when the court below acted in a summary manner, or in a new course, different from the common law.

Still more recently, it was held, that a writ of error did not lie upon the refusal of the supreme court to grant a peremptory *mandamus*, when applied for on motion, but that it lay, for the relator, only when judgment was pronounced after issue was joined upon plea or demurrer, on the coming in of the alternative *mandamus*. It was not denied that the determination was final, and settled most important rights; but the case was dismissed, because the party had elected to proceed by summary application, and was not, therefore, able to put the judgment of the court below into the shape of a formal record. (*The People v. The President and Trustees of Brooklyn*, 13 Wend. 130.)

But still greater difficulty has been found to exist, in fixing a rule of interpretation in respect to the provision authorizing the court of errors "to correct and redress all errors that have happened, or may happen in the court of chancery." The organization of the court of chancery being essentially different from that of courts of law, and the exercise of equity jurisdiction being necessarily carried on by orders and decisions during the progress of the cause, (many of them having reference to its formal proceedings, and others essentially affecting its merits,) it became evident, at an early day, that the right of review in such cases could not, with propriety, be limited to their final determination. And yet, on the other hand, it was equally apparent, that it could not be extended to every order made in cases of that nature. Hence, the difficulty, and as the court itself has been compelled to admit, the impossibility, of fixing a rule upon the subject.

In one case, (*Trustees of Huntington v. Nicoll*, 3 Johns. Rep. 566,) Mr. Justice *Van Ness* remarked, that "if it were practicable, it would be very desirable, by a decision of this court, on some proper occasion, to establish a rule on this subject, whereby the profession may hereafter be governed." And in seven reported cases, from the period of that decision to the present, in which the question has arisen in every variety of form, the court have disclaimed the attempt to prescribe a rule and have contented themselves with exercising a discretion, as

to whether they could exercise or withhold jurisdiction, according to the nature of the order appealed from; and at times, have intimated that their discretion, in this respect, depended upon the probable effect of the order upon the merits of the cause. (*M<sup>r</sup> Vickar v. Wolcott*, 4 Johns. 510; *Buel v. Street*, 9 Johns., 443; *Beach v. The Fulton Bank*, 2 Wend. 225; *Williamson v. Hyer*, 4 Wend. 170; *Chapman v. Hammersley*, 4 Wend. 173; *Rowley v. Van Benthuyzen*, 16 Wend, 369; *Rogers v. Hosack's ex'rs*, 18 Wend. 319; *Rogers v. Holley*, 18 Wend. 350.)

A reference to these cases will shew, that the nearest approach which has been made to a rule upon the subject, is, that a final decree may be in all cases appealed from, but that an interlocutory order, on a mere question of practice, or on a motion addressed to the mere discretion of the court, is not the subject of review. Some of the judges, it is true, have applied the test whether an interlocutory order directly touched the merits of the controversy, but have still declined adopting that as a rule; and in one of the latest cases on the subject, which was most elaborately considered, Mr. Justice *Bronson*, in delivering the unanimous opinion of the court, hesitates to fix a rule, and expresses himself unprepared to say, that there can be no appeal where the order does not directly touch the merits. (*Rowley v. Van Benthuyzen*, 16 Wend. 371.)

There is a class of cases, also, arising both at law and in equity, in which a rule has been established as to the jurisdiction of the court of errors, the application of which to the court of appeals may, at least, admit of a question. It is, that no writ of error or appeal lay to that court, from any other than an *actual* determination of the supreme court or the court of chancery, upon a point raised below; and this, notwithstanding the comprehensive language of the statute; which, as has been seen, authorized the court of errors, as it now does, in respect to the court of appeals, "to correct and redress all errors that have happened or may happen in the court of chancery." (*Colden v. Knickerbacker*, 2 Cowen, 31; *Gelston v. Hoyt*, 13 Johns. 561; *Henry v. Cuyler*, 17 Johns. 469; *Camp-*

*bell v. Stakes*, 2 Wend. 145 ; *Houghton v. Starr*, 4 Wend. 175 ; *Kane v. Whittick*, 8 Wend. 230.)

The rule in question, rests upon a peculiarity of organization in the court of errors, which led that court to give a construction to the statute, not called for by its language, or even by its spirit, unless as they were both controlled by its constitutional structure.

But, as has been already observed, it is questionable, at least, whether such a construction can be put upon the act in reference to the court of appeals. The reasons for this rule are clearly stated by Chancellor *Walworth*, in delivering the opinion of the court of errors, in *Campbell v. Stakes*, 2 Wend. 145. "There is a mannifest difference to be observed," says he, "between the proceedings on writs of error in this court, and the proceedings of the supreme court, on writs of error to inferior tribunals. The supreme court are bound to correct all errors in the proceedings of inferior tribunals, which are brought before them, whether they relate to decisions either actually or nominally made by the court below, or to matters out of the record, usually denominated errors in fact. But, in the organization of this court, it was evidently the intention of the framers of the constitution, that it should be strictly an appellate court, for the re-examination and correction of erroneous decisions, actually made by other tribunals, upon questions actually presented to them for their determination. The provisions in the constitution, requiring the judges of the supreme court, on writs of error, to assign the reasons for their judgment, and excluding them from voting in favor of the affirmance or reversal of their judgments, are both founded upon the presumption, that they have actually passed upon the question in the court below." And, after citing a number of cases, to show that the party may, in every case, take the opinion of the supreme court, he concludes : "I am not aware of any possible case, in which there can be an error in the record or proceedings of the supreme court, which would afford sufficient ground for reversing their decision, here, in which the party may not, if he applies in time, present the question directly to that court

for their decision, in the first instance. If he does so, and that court decide against him, it may then be proper for him to apply to this court, to review that decision upon a writ of error. In the case before us, the alleged error, in the finding of the jury, appeared upon the face of the record. If it forms a sufficient ground for reversing the judgment, it would have been equally available by a motion in arrest. If the party had moved in arrest, and the supreme court had considered the objection well taken, that court would have awarded a *venire de novo*, to supply the defect, or have permitted the plaintiff to amend the verdict, in such a manner as to correspond with the actual finding of the jury."

From this review of the cases on the subject, it will be seen that doubts of no unimportant character exist, as to the extent of the jurisdiction of the court of appeals. If there were no other reason, therefore, for proposing to place it upon a more certain basis, the embarrassments by which it is now surrounded, would, of themselves, be sufficient. But, in our judgment, there is a still more pressing necessity for the immediate exercise of legislative discretion, in regulating the jurisdiction of this court. One of the most certain means of preventing unjust delay in the conduct of legal controversies, is to protect the court of last resort from being borne down by an unnecessary amount of litigation. It cannot be denied, that upon the successful accomplishment of the labor properly cast upon it, the beneficial operation of the whole judiciary system necessarily depends; and no one who justly appreciates the necessity of preserving its usefulness, will hesitate to admit, that this protection is due not to the court alone, but to the paramount interests of the community.

We are far from undervaluing the right of appeal, and should be most unwilling to restrict its exercise, from any consideration of mere expediency or convenience. The purposes of justice seem to us, however, to require that some check should be imposed upon it, by which it shall be made the means of promoting substantial right, instead of being, as is too often

is, the instrument of oppression. At all events, this necessity is quite apparent, in reference to the court of last resort.

The means by which this end can be attained, consistently with a due regard to both public and private interests, have been the subject of the most careful consideration; and after weighing every argument in favor of and against the different plans which have been suggested, the conclusion at which we have arrived, is, to embody in the proposed act the principles which we now proceed to submit.

1. The title we are now considering proposes to give an appeal to the court of appeals, from the actual determinations heretofore made at a general term, by the supreme court or by the superior court or court of common pleas in the city of New-York; *first*, in giving a final judgment, and on such appeal, to review any intermediate order involving the merits, and necessarily affecting the judgment; and *secondly*, in a final order affecting a substantial right, made in a special proceeding or upon a summary application in an action, after judgment; but withholds the right of appeal, where the action was originally commenced in a court of a justice of the peace, or in a local justices' court in a city. By this definition of the powers proposed to be conferred on the court of appeals, it will be perceived, that every doubt is obviated as to the right of the court to review judgments which are merely formal, and which have not undergone consideration in the court below, and that an actual and final determination of a matter, involving a substantial right, is made the real, as it should be the only test. While, however, it is proposed to cut off an appeal from interlocutory orders, and thus to obviate the embarrassments which have heretofore existed, in fixing a rule as to what orders of that nature are properly reviewable, care has been taken to provide, that, on an appeal from a judgment, the court may review any intermediate order involving the merits, and necessarily affecting the judgment. The right of appeal, thus conferred, being prospective, and applicable only to decisions hereafter made by the courts named, it, of course, does not interfere with the

jurisdiction now existing in appeals pending, or apply to those to be brought, (either by writ of error or appeal,) from judgments already rendered by those courts, or from those hereafter to be rendered by the late supreme court and court of chancery.

It is proper also, here to remark, that the effect of adopting this section as proposed, will be to repeal the provision of the act of last December, amending the judiciary act, (*2 Laws of 1847, p. 639, sec. 5,*) which gives an appeal to this court from a decision by the late or present supreme court, upon a bill of exceptions, in either granting, or refusing to grant a new trial. This provision was a great, and in our judgment, uncalled for innovation upon the jurisdiction of the highest appellate court; at least so far as the review of a decision granting a new trial upon bill of exceptions is concerned. In the case of a refusal, a review might always have been had, and is still retained by the section we have proposed; for, in such case, final judgment follows, as a matter of course. Participating, as we do, with the legal profession, and with the community at large, in a desire that this most important court should not be unnecessarily burdened, and foreseeing, as we do, that such must be the inevitable result, if every case in which a new trial is granted by the supreme court upon a bill of exceptions, may be in the first instance brought before it for review, we have no hesitation in recommending that this new and unnecessary branch of its jurisdiction be removed.

The chief embarrassment we have met with, in fixing the right of appeal, has been in reference to the courts whose judgments should be reviewed in the first instance by the court of appeals. As to the review of judgments of the supreme court, no difficulty exists. But in reference to appeals from the superior court and common pleas in the city of New-York, if we were to regard the question as a new one, we confess we should have some hesitation. Nor do we intend, by the recommendation that this feature of the act be adopted, to conclude ourselves from proposing, in our future reports, such alterations as may strike us as expedient, in respect to an appeal from one or

both of those courts. For the present, we have deemed it advisable to adhere to the provision of the act passed in December last, amending the judiciary act, which gives an appeal from orders and decrees of those courts, in equity cases, and from their judgments at law; (2 *Laws of 1847*, p. 639, 642, sec. 3, 23,) except, that in respect to the latter, we have omitted the provision restricting the right of review to cases where the judgment exceeds a thousand dollars, exclusive of costs. The wisdom of such a limitation is not very apparent, and its retention seems wholly unnecessary, if not unjust. If no other reason against it were to be found, it is a sufficient one, that it gives to a defendant in all cases the right of a review directly by the court of appeals, where the sum recovered exceeds a thousand dollars, while an unsuccessful plaintiff, whose demand may be twenty times as great, must appeal to the supreme court in the first instance, unless, perchance, the costs taxed against him exceed that amount. But this provision involves a further inconsistency. The true theory of the right of appeal would seem to be, that it should be enlarged instead of being diminished, in proportion to the magnitude of the controversy. This principle is, however, reversed by the provision in question; and where the amount in controversy is very great, the party has but one appeal, while, where it is small, he has two; first, to the supreme court, and then to the court of appeals.

2. By the second subdivision of the section under consideration, we propose, that no appeal to the court of appeals shall be allowed, in actions originally commenced before justices of the peace, or in the justices' courts existing in several of the cities of the state. This provision might safely be defended, upon the principle, that in cases involving amounts as small as constitute the utmost extent of a recovery in those courts, the spirit of litigation should be discouraged, as rendering the remedy worse than the disease. The experience and observation of those who are familiar with the business of the court of errors, as well as with that of the court of appeals, will attest, that this class of litigation in those courts, has operated

most oppressively upon the rights of suitors, as well as upon the best interests of the public. And we do not hesitate to affirm, that the extent of evil it has produced has been incalculably greater than any possible amount of good which can result from its continuance. A proper degree of weight should, undoubtedly, be conceded to the argument, that the question of right and not of mere expediency, should be the test. But at the same time, much is due to the consideration, that the ruinous consequences of fomenting and encouraging a litigation, not adapted to bear the burdens it involves, should be seriously regarded.

It is a portion of our plan, that in no case should there be more than two appeals. There may then, in every case, be an examination of the questions by three courts; thus furnishing as strong an assurance of eventual justice, as the imperfect character of human institutions will admit. For example, the judgment of a justice may be first reviewed by a county court, and from the judgment on review, an appeal to the supreme court may be had. The judgment of a county court, or of a mayor's or recorder's court, may be in the first instance reviewed by the supreme court, and then by the court of appeals; and that of the supreme court, (which, in every instance, must be first given at a special term or circuit, by a single judge,) may be primarily reviewed by the full court at a general term, and then by the court of appeals.

In this respect, therefore, a perfect uniformity exists throughout the whole state, with the exception of the city of New-York, where, from the peculiar character of the local judiciary, a different result must follow, but one which is not of sufficient importance to justify a departure from the principle of the section under consideration. We refer to the fact, that, in that city, there can be but one appeal, where the action is originally commenced in the marine court, or in an assistant justices' court. By the existing statutes, as well as by the subsequent proposed provisions of this act, the appeal in these cases must be to the superior court. In this particular in-

stance, we are compelled to admit that there is an apparent want of uniformity in the principle of appeal, as embodied in the proposed act; but it is one which results, as has been already remarked, from the peculiar character of the local courts in New-York, and which should not constitute an exception to the general rule, that a justices' judgment should not be reviewed by the court of appeals. There is but one way in which it can be obviated; and that is, by withholding the right of appeal to the court of appeals in the first instance, from the judgments of either the superior court or common pleas in New-York, leaving its judgments to be first reviewed by the supreme court, and by conferring upon the court, thus excepted, the right to review the judgments of the local justices' courts. For the reasons already stated, however, we have not felt called upon, at present, to recommend a change of the policy adopted by the last legislature, as to the review of the judgments of the superior court or common pleas, directly by the court of appeals. In retaining it as it now stands, with the incidents necessarily connected with it, as proposed in this act, we are fully persuaded that no injustice can result, and that no well founded complaint will be made. Should it be found in practice to be inconvenient, we shall, in our future report upon the complete organization of the judiciary, propose such change as shall be deemed necessary or advisable.

§ 12. The court of appeals may reverse, affirm, or modify the judgment or order appealed from; and its judgment shall be remitted to the court below, to be enforced according to law.

The same, in substance, as provided in the judiciary act of 1847. (1 *Laws of 1847*, p. 321, sec. 10.)

§ 13. There shall be six general terms, in each year' to commence on the first Tuesday of January, March, May, July, September and November, and to continue until the fourth Saturday thereafter, inclusive, unless all

the causes ready for hearing be sooner heard. They may, however, be continued as much longer as the court shall deem necessary. Additional terms may also be held, by order of the court.

This provision is intended as a substitute for so much of the ninth section of the judiciary act, (1 *Laws of 1847*, p. 321,) as provides for at least four terms of the court of appeals in each year, at such times as the court shall appoint, and to be continued as long as it shall deem necessary.

It is not intended, at present, to interfere with the power of the court to fix the places of holding the terms, (as regulated by the section just referred to,) and which are required to be so arranged, as that there shall be a term once in every two years in each of the judicial districts. We shall hereafter make such recommendation on this subject, as may be deemed advisable.

§ 14. The concurrence of five judges shall be necessary, to pronounce a judgment. If five do not concur, the appeal shall be reheard.

By the sixth section of the judiciary act, (1 *Laws of 1847*, p. 321, sec. 6,) six judges of the court of appeals constitute a quorum, and four, therefore, may pronounce a judgment.

By the present practice, upon an equal division of the court, the judgment below is affirmed. But it is well settled, that such an affirmance merely determines the particular case, and leaves the questions involved in it, open for consideration in any future case in which they may arise. (*Bridge v. Johnson*, 5 Wend. 342; *The People v. The Mayor and Aldermen of the City of New-York*, 25 Wend. 252.) Besides, as was decided by the court of errors, in the case last cited, and by the supreme court of the United States, in *Martin v. Hunter's Lessee*, 1 Wheat. 355, a rehearing in such case, cannot, in the absence of statutory authority, be allowed.

Whatever may be the policy of such a rule, in courts whose judgments may be reviewed, the principle that a judgment of a court of last resort, rendered by a tie vote, should determine the rights of parties, while, it is conceded, it does not settle the principles on which those rights depend ; nay, while, at the very next term, those principles may be differently settled,—strikes us as incompatible with a sound administration of justice. The rule is, itself, a technical one, merely. It is, in effect, but saying, that, because on the first hearing, a party fails to obtain a reversal, his rights are to be forever concluded; and its application is universal, whether property, liberty or life be affected by the judgment. No one, it seems to us, can hesitate to admit, that it is wiser to say, in such a case, that the cause should be reheard ; so that with the determination of the individual case, the principle which is to govern in future, should be established.

## TITLE III.

### **Of the Supreme Court, Circuit Courts, and Courts of Oyer and Terminer.**

- SECTION 15.** Existing statutory provisions, as to terms and business of the court, repealed; and order of the court fixing the terms, &c., abrogated.
16. General terms prescribed.
  17. Concurrence of a majority of judges, necessary to give judgment.
  18. Special terms, circuit courts, and courts of oyer and terminer prescribed.
  19. The same to be held together.
  20. Duration of special term.
  21. Duration of the circuit court.
  22. Duration of the court of oyer and terminer.
  23. Times and places of general and special terms, circuit courts, and courts of oyer and terminer, how designated, and by whom to be held.
  24. Extraordinary general terms, circuit courts and courts of oyer and terminer, how appointed.
  25. Places of holding the courts.
  26. Publication of appointment thereof.
  27. Designation of the judges therefor.
  28. When other judges may hold the courts.
  29. Certificate of business at term and circuit, to be transmitted to the governor.
  30. Duty of the judges, as to business out of court.
  31. Rooms, fuel, &c., how to be furnished.

This title has for its object, a new arrangement of the mode of transacting the business of the supreme court and its various branches. In this respect, a change in the present machinery of the court has been called for by the whole state; and after fully considering every suggestion as to the best mode of accomplishing the object, we feel great confidence in submitting to the legislature the provisions of this title.

As the supreme court is organized by the judiciary act, its business is distributed among general and special terms and circuits. With the latter, are connected the courts of oyer and terminer, which must be held at the same time and be presided over by the same judge. The general terms are required *to be held in every county having a population exceeding forty*

thousand, at least once a year, and in every other county, except Hamilton, as often as once in two years; and must be so arranged, that at least one term shall be held annually in each county, or in a county adjoining. At least two special terms are required to be held, annually, in each county, except Hamilton; in addition to which, a special term may be held with each circuit. At least four circuits are required to be held, annually, in the city and county of New-York, and two in every other county, except Hamilton. The times and places of holding the circuits and courts of oyer and terminer, and the judges by whom they are to be held, are required to be designated by an order of the whole court, every two years; except that the first, which was made in July last, is to continue until the end of the year 1849. In respect to the designation of the judges, it is provided that each shall, during his term of office, be employed in holding the general and special terms, circuits and courts of oyer and terminer, in each district, in proportion, as near as possible, to the business of the courts in the several districts, or in at least as many districts, as he shall have years to serve from the commencement of his term; and their duties are required to be so assigned, that each shall hold as equal a proportion as possible, of those terms and courts. (1 *Laws of 1847*, p. 325, 327, *sec.* 19, 24.)

In obedience to these requirements, a convention of the whole court was held in July last, at which an order was made prescribing the times and places of holding the general and special terms, circuit courts and courts of oyer and terminer, during the residue of the year 1847, and the years 1848 and 1849, and assigning the business and duties thereof to the several judges, as stated in a schedule appended to the new rules. A mere glance at its contents, will abundantly show the confusion into which the court has been thrown, and the inefficiency to which it must be ultimately reduced, if the existing arrangement of its functions be allowed longer to continue. While some weight is due to the argument upon which it is founded,—that by scattering the judges around the state, the possible injurious consequences of local prejudices or attachments may be obviated,—this consideration sinks into insignificance

when compared with the inconvenience, to which, in other and more important respects, it has given rise. The waste of time, on the part of the judges, in travelling about the state, if there were no other answer to it, would of itself be conclusive. But those who have been witnesses of the want of uniformity in the proceedings of the court,—of the hasty manner in which cases must necessarily be considered by judges, who attend at a distance from home, to hear them, and separate at the adjournment of the court, not to return,—and above all, the natural embarrassment of both the bench and the bar, arising from a want of familiarity with each others' habits of thought and character of mind, will readily attest that higher considerations of policy demand a change.

The present title proposes to effect this object, by establishing six general terms annually in each judicial district; by throwing together the special terms, circuit courts and courts of oyer and terminer, and allotting a sufficient number to each county, based, in part, upon its population; and by providing for their continuance for a specified time, for the transaction of their business, and for a longer period, if necessary. The designation of the times and places of holding the courts, and of the judges by whom they are to be held, is proposed to be given to the governor, as being, from his relation to the whole state, the most fitting depository of that power. And in designating the judges, the governor is required to do so, in such a manner as that not more than one half, nor less than one fourth of the courts to which each judge shall be assigned, shall be out of the district for which he was elected; and that at least one of the judges, who shall hold a general term, shall sit at the next succeeding term, and shall deliver the judgments agreed upon, in cases held under advisement, from the preceding term.

These are the general and prominent subjects embraced in this title; but there are others of minor importance, though necessary, which sufficiently explain themselves.

§ 15. *All statutes, now in force, providing for the designation of the times and places of holding the general*

and special terms of the supreme court, and the circuit courts and courts of oyer and terminer, and of the judges who shall hold the same, are repealed, from and after the first day of July next; and the order of the supreme court, adopted July 14, 1847, prescribing the times and places of holding the general and special terms of the court, and the circuit courts and courts of oyer and terminer, during the residue of the year 1847, and for the years 1848 and 1849, and assigning the business and duties thereof to the several judges of the court, is, from and after the first day of July next, abrogated; and the provisions of this title are substituted in place thereof.

§ 16. Six general terms of the supreme court shall be held annually in each judicial district, and be continued at least fifteen days, unless sooner adjourned for want of business. They may, however, be continued as much longer as the court shall deem necessary.

§ 17. The concurrence of a majority of the judges holding a general term, shall be necessary to pronounce a judgment. If a majority do not concur, the case shall be reheard.

It will be seen, when we come to the subject of appeals, that the business of the general terms is to review the judgments given at the special terms and circuits, and the reports of referees. The general terms, therefore, are in the nature of courts of appeal. It may, and not unfrequently will happen, that the judge who rendered the judgment at the special term or circuit, will sit at the general term; and if he do, he will, of

course, have a voice in the decision of the cause. If four judges hold the general term, a tie vote will decide the cause, of which the vote of the judge whose judgment is reviewed, may be one. This should not be allowed. The inconvenience of a rehearing is far less than the injustice of a judgment, depending upon the mere technical rule, that if the party holding the affirmative fail in obtaining a majority, his case is determined, while his rights remain undecided. This we think objectionable, for the reasons stated in the note to section 14, (p. 24, 25,) in respect to a judgment of the court of appeals.

§ 18. The number of special terms, circuit courts and courts of oyer and terminer, annually, in the several counties, shall be as follows:

*Eleven*, In the city and county of New-York.

*Six*, In the counties of Albany, Erie, Kings, Monroe and Oneida.

*Five*, In the counties of Dutchess, Jefferson, Onondaga, Rensselaer and St. Lawrence.

*Four*, In the counties of Allegany, Cayuga, Chautauque, Chenango, Columbia, Delaware, Herkimer, Livingston, Madison, Niagara, Ontario, Orange, Oswego, Otsego, Saratoga, Steuben, Suffolk, Tompkins, Ulster, Washington, Wayne and Westchester.

*Three*, In the counties of Broome, Cattaraugus, Che-mung, Clinton, Cortland, Essex, Franklin, Fulton with Hamilton, Genesee, Greene, Lewis, Montgomery, Orleans, Putnam, Queens, Richmond, Rockland, Schenectady, Schoharie, Seneca, Sullivan, Tioga, Warren, Wyoming and Yates.

The proposed large increase of circuits and terms, may strike the mind, at first view, as imposing too heavy a burthen upon the judges, especially in traveling. But, when it is observed, that the law of 1847 requires at least two special terms, in addition to the circuits, to be held in each county, and that it is proposed to unite the circuit courts and special terms, both being held at the same time and place in each county, and to diminish the aggregate number, it will be apparent that such an apprehension is unfounded.

The arrangement of the special terms, circuits and courts of oyer and terminer, which, (as has been stated in the preliminary note to this title,) have, for the sake of greater convenience, been classed together, is, with the exception of the city of New-York, based mainly upon the population of the several counties of the state. To the city of New-York, this section proposes to assign eleven of these courts, annually, as being necessary to the efficient despatch of business in that city, which composes the first judicial district. It assigns *three* special terms, circuits and courts of oyer and terminer, annually, to every county, the population of which exceeds 33,000; *four*, for over that number, and not more than 52,000; *five*, for over 52,000, and not more than 70,000; and *six*, for more than 70,000; varying these proportions, in some slight degree, according to the amount of business, which is of course greater in counties containing a commercial or manufacturing population, than among those devoted to agricultural pursuits. The facts upon which this apportionment is based, will be seen by reference to the appendix, containing, in tabular form, the statistics of the existing and proposed arrangements of the terms and circuits.

An inspection of the table will show, that so far from overloading the justices of the supreme court with business, on a fair estimate of the average duration of the circuits and terms, less than two-fifths of the time of each judge will be occupied in actual court duties; and there is a great probability, that an abatement from that estimate will be the practical result.

By this table it appears that the present number of courts for the trial of issues of fact, in ordinary civil actions, (excluding the city courts and the appellate or general terms of the supreme court,) are as follows :

|  |       |
|--|-------|
| Circuits, as ordered for the year 1848,  | 126   |
| Special terms,   | 145   |
| County courts, requiring the attendance of jurors,   | 203   |
|  | <hr/> |
| Aggregate number of trial courts,  | 474   |
| Proposed number of courts for the trial of the same issues,  | 227   |
| Aggregate number of circuits and special terms, as now organized, each requiring the travel and attendance of a supreme court judge, | 271   |

By the existing law, each county court has several terms a year, part of which are jury terms, and part, law terms. The number of these terms we propose to fix; but we dispense with the attendance of grand and petit jurors in the sessions, (except in the city of New-York,) unless the board of supervisors shall require it.

It is estimated that the business of the general terms will be done in two weeks each, on an average, (except in the city of New-York, for which three weeks are allowed,) making 102 weeks.

|   |     |
|---|-----|
| Three judges 102 weeks, (the present system requires the same amount of business and therefore the same amount of service in general term,) | 306 |
|---|-----|

|  |     |
|--|-----|
| It is estimated that the circuits will average one week each, (except in the city of New-York, for which three weeks are allowed,) | 244 |
|--|-----|

(The present system has an aggregate of circuits and special terms, of 271.)

|                      |         |
|----------------------|---------|
| Total court service, | 540w'ks |
|----------------------|---------|

This number divided by 28, (the number of judges to hold the courts,) shows less than 20 weeks court service to each judge.

It is confidently believed, that the business of the courts may all be done within these periods, as soon as the present *accumulation of business* has been disposed of.

An increase of one half of the time above estimated for circuits, will add four weeks only, of court service, to each judge.

§ 19. Special terms, circuit courts, and courts of oyer and terminer, shall be held at the same places, and commenced on the same day.

§ 20. The special term shall continue until the adjournment of the circuit court; and the judge may continue it longer, or adjourn it to any other time or place, within the county.

§ 21. The circuit court shall continue at least twelve days, unless sooner adjourned for want of business. It may, however, be continued as much longer as the court shall deem necessary.

§ 22. The court of oyer and terminer may continue, as long as the court shall deem necessary.

§ 23. The governor shall, on or before the first day of May next, by appointment in writing, designate the times and places of holding the general and special terms, circuit courts, and courts of oyer and terminer, and the judges by whom they shall be held; which appointment shall take effect on the first day of July, thereafter, and shall continue until the thirty-first day of December, 1849. The judges of the supreme court shall, in like manner, at least one month before the expiration of that time, appoint the times and places of holding those courts, for two years, commencing on the first day of January, 1850, and so on, for every two succeeding years.

§ 24. The governor may also appoint extraordinary general and special terms, circuit courts, and courts of oyer and terminer, whenever, in his judgment, the public good shall require it.

§ 25. The places appointed within the several counties, for holding the general and special terms, circuit courts, and courts of oyer and terminer, shall be those designated by statute for holding county or circuit courts. If a room for holding the court in such place shall not be provided by the supervisors, it may be held in any room provided for that purpose, by the sheriff, as prescribed by section 31.

§ 26. Every appointment, so made, shall be immediately transmitted to the secretary of state, who shall cause it to be published in the newspaper, printed at Albany, in which legal notices are required to be inserted, at least once in each week, for three weeks, before the holding of any court in pursuance thereof. The expense of the publication shall be paid out of the treasury of the state.

§ 27. The designation of judges to hold the courts, shall be such, as that not more than one-half, nor less than one-fourth of the courts to which each shall be assigned, shall be held out of the district within which he was elected; and so that, of the judges who shall hold a general term, one, at least, shall sit at the next suc-

ceeding general term, and shall deliver the judgments of the judges who held the preceding term, in causes there argued and held under advisement.

The arrangement in this section is such as essentially to modify the provisions of the judiciary act. By that act it seems to be intended, that each judge shall perambulate the state and perform an equal share of the duties of each judicial district. Very earnest remonstrances against the continuance of this rule have been made, as being less convenient to the public, and very onerous to the judges. Under the section here proposed, a considerable interchange among the judges is secured. The inequality caused by the large number of circuits in some districts, and by the business of the commercial cities in others, may be equalized among the judges, while at the same time the terms and circuits may be so arranged, if desirable, as that the business of every judge may be confined to his own and an adjoining district. Or, on the other hand, if experience shall demonstrate that a greater and more distant interchange is desirable, the governor may make the designations accordingly.

The reason for conferring upon the governor the power to make the designations, is founded upon the peculiar structure of the supreme court. The judges are elected by districts, though the object of the constitution plainly is, that they shall compose one court. The judges are, as far as the proper performance of their duties will allow, to be divested of a local character; and to effect this object, the exercise of some general superintending power over the arrangement of the courts and the designation of the judges to hold them is necessary. We have before said, that the governor is, in our judgment, the most fitting depositary of this power. He is so, because, of his opportunities of being correctly informed as to the wants of every portion of the state in this particular, and because, as the chief executive officer of the state, he can be more con-

veniently than any other, entrusted with the discretion proposed to be vested in him.

§ 28. In case of the inability, for any cause, of a judge assigned for that purpose, to hold a special term or circuit court, or sit at a general term, or preside at a court of oyer and terminer, any other judge may do so.

§ 29. Within ten days after the expiration of every term and circuit court, the clerk shall certify to the governor, the number of actions on the calendar, the number tried or heard, the number decided, the number remaining undisposed of, and the duration of the term or circuit.

§ 30. The judges shall, at all reasonable times, when not engaged in holding court, transact such other business as may be done out of court. One of the judges elected in the first judicial district, to be designated from time to time, among themselves, shall attend for that purpose, at the city-hall in the city of New-York, on every judicial day, from ten o'clock in the forenoon until three o'clock in the afternoon, and longer, if the business require it; and every proceeding commenced before one of those judges, may be continued before another, with the same effect as if commenced before him.

§ 31. The supervisors of the several counties shall provide the courts appointed to be held therein, with

rooms, attendants, fuel, lights and stationery, suitable and sufficient for the transaction of their business. If the supervisors neglect, the court may order the sheriff to do so ; and the expense incurred by him in carrying the order into effect, when certified by the court, shall be a county charge.

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## TITLE IV.

### Of the County Courts.

**SECTION 32.** Repeal of existing statutes, defining their jurisdiction.

33. Their jurisdiction.

34. General terms; and times of transacting business.

35. Issues of fact, how to be tried.

36. Jury, how summoned.

37. Proceedings on trial by jury.

38. Juries in county courts dispensed with, and in general sessions provided for.

§ 32. All statutes now in force, conferring or defining the jurisdiction of the county courts, are repealed ; and those courts shall have no other jurisdiction than that provided in the next section. But the repeal contained in this section shall not affect any proceedings, now pending in those courts.

§ 33. The county courts shall have jurisdiction, in the following actions and proceedings :

1. The exclusive power to review a judgment rendered in a civil action within their respective counties,

by a court of a justice of the peace, or by the justices' courts in the cities of Albany, Troy and Hud-on, respectively ;

2. For the foreclosure or satisfaction of a mortgage, and the sale of mortgaged premises, within the county ;

3. For the partition of real property, within the county ;

4. For the admeasurement of dower in real property, within the county ;

5. For the sale of the real property of an infant, when the property is situated, and the infant resides, within the county ;

6. For the care and custody of the person and estate of a person of unsound mind, or an habitual drunkard, residing within the county ;

7. For the mortgage or sale, on the application of a religious corporation, of its real property within the county, and the appropriation of the proceeds thereof ;

8. In cases, in which jurisdiction was vested by the Revised Statutes, in the late courts of common pleas, under the provisions relating to attachments against absconding, concealed or non-resident debtors, to voluntary assignments, made pursuant to the application of an insolvent and his creditors, and to voluntary assignments by persons imprisoned on execution in civil cases ;

9. In proceedings for the remission of fines and forfeited recognizances.

The most important feature of this title is embraced in these two sections, and relates to the powers to be conferred upon the county courts. On this subject, a question of great importance has arisen, as to the nature and extent of their jurisdiction, as defined by the judiciary act, and as intended to be conferred by the constitution. From the tenor of the constitutional provisions relating to the county courts, and from the ample judicial force provided for the trial of issues in the supreme court, it has, we believe, been generally understood that it did not contemplate, that jurisdiction in ordinary civil actions would be vested in the county court. The judiciary act, however, gives a different construction to that instrument, and invests the county court with powers and jurisdiction similar to those of the old common pleas.

The peculiar circumstances under which that act became a law, afford reasonable ground for considering any constitutional construction which may be found characterizing its provisions, rather as the result of impressions forced to a hasty result by the circumstances, than as the expression of any deliberate conviction or opinion of the legislature. It is well known, that the act in question first came under consideration during the last few days of the session, under the great pressure of business which always attends that period, and when every member felt the imperious necessity of immediate action upon the various provisions of a law, whose extended sections embraced the entire judicial organization under the new constitution. Pressed by the positive requirements of that instrument, and the peril of absolute suspension in the administration of justice, prompt rather than deliberate action became a matter of necessity.

Even if this law had come into existence under circumstances more favorable to give it weight as a legislative construction of the constitution, still we would feel ourselves obliged, in the proper discharge of our duty, to consider the subject with entire and unembarrassed freedom, and to propose such changes as we might deem necessary, either to obviate consti-

tutional objections, or to secure a cheaper and better administration of justice.

It is obvious, that in order to secure the proper fruits of the constitution, it should be carried into effect in its own spirit. Its organization should be administered by its friends, and not by its adversaries. And although those who constructed the system, may have failed to fence it about in a manner so skilful and effectual as to prevent an evasion of its intent, yet it should be the object of those, who are charged with the duty of carrying it into operation, to follow its indications in the spirit of its framers, rather than to cast about to find some unfenced outlet for escape from its intended course. To those who are familiar with the proceedings in the recent constitutional convention, who observed its progress, heard or read its debates, and appreciated its spirit, there exists no question as to the intent of its prevailing majority. They know how often, and with what earnestness, the friends of a system of common pleas courts, pressed it upon their attention, and how often, over and over again, it was rejected, in favor of the adopted system of thirty-two supreme court judges, to try all ordinary civil actions.

It was repeatedly urged, and always sustained by the votes of that body, that the large number of judges provided for the supreme court, was necessary, because there was to be no other tribunal for the trial of ordinary civil actions; and it was conceded by the friends of the system, on all occasions, that the only excuse for providing so large a judicial force, to be sustained at public expense, rested in the entire dispensation with the court of chancery, as well as with the county courts of common pleas. To this end, the supreme court is organized with a large judicial force, and in such a manner, that the judges may be employed, in the adjudication of any class of cases, equitable or legal, or in any part of the state, according to the tendency of judicial business.

The third section of the sixth article of the constitution concentrates in the supreme court the general jurisdiction hereto-

fore divided into two great branches of jurisprudence, and administered by distinct tribunals, known as law and equity courts. The constitution no longer recognizes the necessity of separate and distinct systems: for although the terms, "law and equity" are used in conferring jurisdiction, they may with propriety be considered descriptive, referring to the existing condition of things, rather than as implying a separate existence in future.

By the fourteenth section of the sixth article, provision is made for a county judge in each county.

The necessity of having at all times, within each county, a judicial officer, must be obvious to those who appreciate the extent and importance of the judicial business always done out of court. The office duties of surrogate have existed in every county, and one or more supreme court commissioners have exercised their functions in most of the counties; and when to these we add the judicial duties in various special cases, heretofore imposed by law on five county judges—other than that of holding courts of common pleas—all to be concentrated in one officer, it would seem as if the object of the provision of the constitution for a county judge is sufficiently manifest, without implying an intent to confer jurisdiction for the trial of ordinary actions between party and party. The design of that instrument, however, in this respect, is not left wholly to inference. It uses language to define the jurisdiction of county judges, to which it is difficult to affix any rational intent, if it be not to prevent a departure from one of its cherished objects,—that of having a common tribunal for the trial of all civil actions, except those cognizable by a justice of the peace. Its language is: "The county court shall have such jurisdiction *in cases arising in justices' courts, and in special cases*, as the legislature shall prescribe, *but shall have no original civil jurisdiction, except in such special cases.*" If all the qualifying words of this provision, restricting the jurisdiction, were stricken out, it would read thus: "The county court shall have such jurisdiction as the legislature may prescribe." These words would place the whole subject of the jurisdiction at the dispo-

sal of the legislature, precisely where the friends of a common pleas system in the convention desired it to be, and sought in vain to place it. The law of 1847, however, construes it in this way. If this be a just construction, what is the purpose and object of the omitted words, by which the meaning is qualified and the jurisdiction limited, to "cases arising in justices' courts and in special cases;" and also of the further prohibitory language, "but shall have no original civil jurisdiction, except in such special cases?" These words were inserted and adopted for some purpose. By all rules of construction, they must be intended to have a substantial sense and bearing on the whole sentence; and yet, if ordinary actions at law—the very actions which were formerly designated as *common pleas*, and from which the court of that title took its name—if these *common pleas* can be converted into "special cases," by being included in a list of subjects of jurisdiction, then the words last above cited have no meaning, and the provision would have precisely the same effect without as with them.

If there could remain any doubt of the true and proper construction to be placed upon the last cited article, there is still another provision, which, unless that instrument be declared inconsistent with itself, must appear irreconcilable with the exercise of common pleas jurisdiction by the county courts. By the fifth section of the fourteenth article, it is provided, "that on the first Monday of July, one thousand eight hundred and forty-seven, jurisdiction of all suits and proceedings then pending in the supreme court and court of chancery, and *all suits and proceedings originally commenced and then pending in any court of common pleas*, (except in the city of New-York,) shall become vested in the supreme court hereby established. Proceedings pending in courts of common pleas [and]\* in suits

\* The history of the sentence where the superfluous "and" occurs, is as follows:—In the convention, after the constitution had been agreed to, and had been arranged in the order of articles and sections, as it now stands, it was read over for the last time, preparatory to final engrossment, and several amendments were made and deficiencies supplied. Among others, it was observed, that no provision was made for transferring the jurisdiction of the court of common pleas in causes pending in that court, on certiorari and appeal from justices' judgments. A member stated this omission to the convention, and offered an amendment to supply it, which was adopted

originally commenced in justices' courts, shall be transferred to the county courts provided for by this constitution, in such manner and form, and under such regulation as shall be provided by law."

The obvious transfer, by this section, of all the business of the county courts, (except cases on certiorari and appeal from justices' courts,) to the supreme court, is inconsistent with the supposition that the constitution intended to allow to the county court, jurisdiction in precisely such cases, hereafter, as it transfers to the supreme court. That it was done by no loose or unguarded form of expression, is manifest from the particular and specific description of the cases sent to the supreme court, as well as those sent to the county court. Whatever hope, therefore, might be entertained by the friends of the two court system, of a construction favorable to their views, on the provisions of the sixth article, must be dispelled, it would seem, on a careful examination of the self-construction contained in the fourteenth article of the same instrument.

The fourteenth article, though a part of the constitution, and as such the law paramount, is nevertheless confined to provisions intended to carry into effect the preceding thirteen articles, and is temporary only, in effect, being in substitution for laws, to set itself in operation. It creates the county courts, with jurisdiction in cases arising in justices' courts only, and it sets the supreme court in motion, charged with the entire origi-

without opposition, and was sent up to the chair, annexed to the article under consideration, and noted in the minutes of the clerk. This amendment, in the handwriting of the mover, still remains in the secretary of state's office, attached to the original, from which the constitution was engrossed. It is in the same words used in the printed copies, except the word "and" before the words "in suits." On a close examination of the parchment roll, it appears to have been in the first instance, without the word "and," but to have been altered afterwards by erasing the words "in suits," and writing them closer, so as to make room for the word "and" before them; the words "and in suits" being written crowded on the erasure. It is quite certain, that no amendment was made in the engrossed parchment roll, on its final reading in the convention. It was probably altered by the engrossing committee, or their clerk, to correct a supposed omission of a word. The sentence should be read, omitting the word "and."

nal jurisdiction in civil actions, of all the former courts, chancery, supreme court, and common pleas.

The offices of the supreme court commissioners and five county court judges in each county having been abolished, the jurisdiction heretofore conferred on those officers by special statutes, is left at the discretion of the legislature, for the county judges, under the name of "special cases." These special cases are numerous and important, and frequently local in character, requiring a judicial officer convenient to the persons interested.

The existence of two courts, having concurrent jurisdiction of the ordinary civil actions, upon which the time of our courts is mostly occupied, involves the necessity of imposing restrictions upon the rights of parties to commence actions in the one or the other, in order to equalize the business, according to the judicial capacity of the two courts respectively.

It has ever been found, that in such cases, too large a share of the litigation will be conducted in one of the courts. This will be overloaded with business, producing delay and expense to suitors; while the other will have little to do, and will sink lower and lower in public estimation, if not in reality, from its want of employment. The history of the supreme court and common pleas in this state, is an exemplification of this tendency. There has been a continual series of legislative enactments, to equalize the business of the two courts, to induce suitors into the county courts, and away from the supreme court, to which they were inclined. It also appears by the report of the British commissioners on practice, that the principal common law courts of the kingdom have long been embarrassed in the same way; and they recommend as a remedy, a virtual amalgamation of the three courts, (king's bench, common pleas, and court of exchequer,) into one, by abolishing all distinctive features in practice, by adopting a common set of rules for them all, by allowing the same attorneys, barristers and advocates equal privileges in each, and by the trial of issues in each court by

the judges of either indifferently ; thus establishing practically a system in their law courts, similar to that of our new constitution ;—merging all the courts into a common system, with the judges of the law courts interchanging and presiding in the trial of all issues.

The existence of separate courts, unless concurrent in all their jurisdiction, also necessarily imposes upon every suitor the selection of the proper tribunal, according to his case ; and if he commit an error in this, it is fatal to his action, for want of jurisdiction. Though the line may be so broad and plain between them, as to seem impossible to be mistaken, yet experience shows that in the infinite variety of cases, one will occasionally occur, where it is not easy to determine which court has cognizance of it. Fortunately, in this respect, all courts have a well known tendency to decide in favor of their own jurisdiction ; but instances have occurred, where a suitor has been turned out of the supreme court, because the matter was held to be a proper subject of equity jurisdiction ; and afterwards, the same party has been defeated in chancery, by a decision, that it was a matter not for that court but for a court of law. Some rule of difference in jurisdiction must be established by law, or it will be manifest that they might be merged into one. This rule must be an arbitrary one. It has sometimes been done, by conferring on a court a particular class of actions by name, and in other cases, by affixing a limit to the amount of which the inferior courts should take cognizance, leaving the superior court open for all cases. Such are, to some extent, the provisions of the judiciary act. It creates a distinction, by an arbitrary rule, among causes of actions, some of which are limited to one court ; and in others, a party may, at the option of his opponent, be drawn into a court whose qualifications are supposed to be inferior, and where he may be subject to the delay and expense of one more appeal, before the controversy reaches the end of the law.

A still more important objection than either of the preceding, arises from the delay in the administration of justice, which must necessarily happen, from having two courts of concurrent,

or even similar jurisdiction. In such cases, each court has its terms for the trial of issues in the county. In most of the counties, there are three terms of the county courts and two circuit courts—all of them requiring the attendance of a grand and petit jury, on an average five times a year. These terms alternate, and each court can try its own issues only. Cases pending in the supreme court, though ready perhaps for months, must lie over the county court terms, until the circuit comes around. As that occurs but twice a year, six months' delay may often happen. When the circuit judge comes at last, he tries the issues joined in the supreme court, or they are put over on some casualty, as the sickness or absence of a witness, to wait another six months. In like manner, causes in the county court, though ready for trial at the time of the circuit, cannot be tried until the time has arrived for the county court term. By these means, the average time to bring to trial any given cause is doubled, and justice is delayed ; whereas, if there were but one court, there might be four circuits in a year, and at each circuit all the issues in the county which were ready, might be tried, and that, too, with greater despatch on the trial, and with less expense to the county, as there would be but four jury terms in a year, instead of five. Three months, instead of six, would be the longest delay for a trial ; and a greater uniformity of decisions and a higher degree of confidence in them would obtain. The increased amount of business in the supreme court, by the transfer to it of all civil actions in which the old common pleas had original or concurrent jurisdiction, would be scarcely felt in that court. The business of the common pleas has been, in most of the counties, if not in all, chiefly derived from causes arising in justices' courts. The number of trials in contested suits, in actions originally commenced there, is surprisingly small. It has often happened, in some of the counties, that a term has been held without a single trial in an original action.

In the convention, a large amount of statistics, showing the business of the several courts, was collected, but a small portion of them only was published ; and we have been unable from thence to obtain information of the number of trials

in original suits in the late common pleas. It was, however, in the discussions of that body, repeatedly stated by one of the members, who had examined the subject, that the whole number of trials in original actions in that court, within one year, (excluding the city of New-York,) was 227; being less than an average of four to each county, and which would add about one cause only to the business of each circuit court, as proposed by us. Whether this estimate is correctly founded, we have not the means to ascertain. It is, however, quite certain, that the number is comparatively small, and that they are usually unimportant in amount and not difficult in character. The aggregate number of circuits and county court jury terms, under the present law, (excluding New-York,) is 329; under the proposed organization, it will be but 227; and as it is proposed to abolish the system of the trial of appeals by juries, in the county courts, the number of civil actions brought there would scarcely justify the retention of the jurisdiction in question. In the county of Herkimer, which may be taken as a fair average of the counties, in business and population, there were nineteen trials only in the common pleas, in original suits, in three years, ending on the first of July last. That would make an average of six trials and a fraction to four circuits, or one and a half to each circuit, allowing four circuits in a year, as proposed. This rate is a fraction, only, larger than the average result stated in the convention; and it shows a business quite too small to justify, on grounds of expediency, the maintenance of a separate tribunal, and the disproportionate public business to which its continuance must give rise.

For these reasons, it is proposed by section 32, to repeal all statutes now in force, conferring or defining the jurisdiction of the county courts, and to limit the jurisdiction as provided by section 33; taking care, at the same time, that the repeal shall not affect any proceedings now pending in those courts.

The thirty-second section defines the actions and proceedings of which the county courts shall have jurisdiction, in nine

subdivisions; the first six of which are the same in substance as the provisions of the judiciary act on that subject. (1 *Laws of 1847*, p. 328, 329, *sec.* 31, 35.) The seventh subdivision confers jurisdiction, in proceedings "for the mortgage or sale, on the application of a religious corporation, of its real property within the county, and the appropriation of the proceeds thereof." This provision is the same in substance as that contained in the amendment of the judiciary act. (2 *Laws of 1847*, p. 643, *sec.* 28.) The eighth subdivision confers jurisdiction "in cases in which jurisdiction was vested by the Revised Statutes in the late courts of common pleas, under the provisions relating to attachments against absconding, concealed or non-resident debtors—to voluntary assignments made pursuant to the application of an insolvent and his creditors—and to voluntary assignments by persons imprisoned on execution in civil cases."

The power thus conferred in relation to absconding, concealed or non-resident debtors, is that formerly exercised by the courts of common pleas, in hearing and deciding, in a summary manner, upon the petition of the debtor for a discharge of the warrant of attachment, on the ground that he was not absconding, concealed or non-resident, when the warrant was issued. (2 *R. S.*, 3d ed., 70, 71, *sec.* 45-52.)

That which relates to the case of voluntary assignments made pursuant to the application of an insolvent and his creditors, embraces the power conferred upon courts of common pleas, to hear and decide the application for a discharge, when the officer granting the order to show cause has no authority to hear the case, by reason of his not being a counsellor at law. (2 *R. S.*, 3d ed., 77, *sec.* 9.)

The remaining provision, in respect to voluntary assignments by persons imprisoned on execution in civil cases, gives the county courts the power formerly exercised by the common pleas, upon the application of a party imprisoned on execution in a civil action, for a sum not exceeding five hundred dollars,

to discharge him from imprisonment. (2 *R. S.*, 3d ed., 88, sec. 1.)

The ninth subdivision refers to "proceedings for the remission of fines and forfeited recognizances," and gives the same power formerly exercised by the courts of common pleas, in remitting fines imposed by courts, and the forfeitures of recognizances. (2 *R. S.*, 3d ed., 580, 581, sec. 37-42.)

§ 34. A general term of each county court, for the final hearing of actions or proceedings pending therein, shall be held at the places in the counties respectively designated by statute for holding county or circuit courts, on the first Tuesday of January, March, May, July, September and November, in each year, and may continue as long as the court deem necessary. The court shall be deemed always open, for the transaction of any other business.

§ 35. An issue of fact hereafter joined in a county court, shall be tried by the court, unless, on motion of either party, it shall order a jury trial.

§ 36. If a jury trial be ordered, the court shall direct the sheriff to summon eighteen residents of the county, competent as jurors, to appear before the court, at a time and place to be specified.

§ 37. A jury shall be drawn from the persons so summoned, or if there be a defect of jurors, it shall be supplied as in other cases. The practice appertaining to jury trials, and to the verdict of the jury, and the proceedings thereon, as in this act provided, shall in all respects apply to such trial.

§ 38. No jury shall hereafter be summoned for a county court, except as provided in the last section, nor shall a grand or petit jury be summoned for a court of general sessions of the peace, (except in the city and county of New-York,) unless so directed by the board of supervisors of the county.

The last five sections are designed to effect a greater degree of simplicity and expedition in the proceedings of the county courts, than can be attained under the existing statutes, and to dispense with an unnecessary attendance of jurors, upon the terms of those courts and, (except in the city of New-York,) upon the courts of general sessions. By the judiciary act, it is provided, that as many terms of the county court in each county, except New-York, shall be held, as the judge shall appoint; and that he shall designate as many of those terms in each year, for the trial of issues of fact by jury, as there were formerly terms of the common pleas in the county; for which jurors shall be summoned, as was formerly required in the courts of common pleas. (1 *Laws of 1847*, p. 327, sec. 26, 27.)

As respects the first part of the provision just referred to, we deem it more convenient that the terms of the courts should be specifically prescribed by statute, and have accordingly proposed, by section 34, for the holding of six general terms, annually, of each of the county courts, on the first Tuesday of January, and of each subsequent alternate month. The character of the business to be transacted at those terms is also changed by the same section, so as to conform it to the change in the jurisdiction of these courts, as proposed by this act. The distinction between jury and other terms, as provided by the judiciary act, arose entirely out of the jurisdiction in ordinary actions, conferred upon these courts by that act, and which, for the reasons stated in a previous note, (p. 39-47,) it is proposed to take away. Should this be done, the jurisdiction of the county courts, which will remain, will be either summary in its nature, or restricted to that class of actions in which a jury trial

will seldom be required ; and the stated attendance of jurors, and consequent expense to the county, will become wholly unnecessary. It is, therefore, provided in the same section, that these terms shall be held for the final hearing of actions or proceedings, and that the court shall be deemed always open for the transaction of any other business.

By sections 35, 36, and 37, provision is made for the trial of issues of fact. These are to be tried by the court in all cases, unless on motion of either party a jury trial be ordered. It is scarcely necessary to say, that in the special proceedings to which the jurisdiction of the court will extend, this is the more convenient mode of trial, as well as perfectly consistent with the constitution. They are not cases in which trial by jury "has been heretofore used," (*Const. art. 1, sec. 2,*) and may therefore be tried in any other manner, unless, for good cause, the court otherwise direct. When they do so, provision is made that the jury be specially summoned to attend, either in or out of term, to try the issue ; and to such trial the rules appertaining to ordinary trials are applied.

The 38th section carries out the principles just referred to, by dispensing with the attendance of jurors at the general terms of the county courts. With a view, also, to prevent the attendance of grand and petit jurors, (except in the city of New-York,) where it may be unnecessary, a discretionary power is vested in the board of supervisors, as to the propriety of requiring such attendance.

As the subject of proceedings in criminal actions is not embraced in this report, we recommend, for the present, that the boards of supervisors, of the several counties, be authorized, in their discretion, to dispense with the attendance of jurors, at such terms of the county court, as they may see fit. The frequent occurrence of the oyer and terminer, which is held with every circuit court, will, it is believed, in most of the counties, dispense with the necessity of jurors at the general sessions. That court has, by the existing laws, jurisdiction in many cases which do not require a jury, and which it will still continue to

exercise. The annual meeting of the several boards of supervisors, will occur after the lapse of sufficient time, to enable them to form a satisfactory judgment, as to the propriety of requiring the attendance of juries at these courts. In the cities, where offences are more frequent, and in some of the large counties, that necessity may exist; but in the agricultural districts it would impose an unnecessary burthen.

## TITLE V.

**Of the Superior Court and Court of Common Pleas, in the city of New-York, and the Mayors' and Recorders' courts in other cities.**

SECTION 39. Jurisdiction of the courts named in this title.

40. Jurisdiction of the New-York superior court, on appeal.
41. General and special terms, of superior court and common pleas, in New-York.
42. General and special terms, by whom held.
43. Judgments, where given.
44. Concurrence of two judges, necessary to a judgment, at a general term.

§ 39. The jurisdiction of the superior court of the city of New-York, of the court of common pleas for the city and county of New-York, of the mayors' courts of the cities of Albany, Hudson, Troy, and Rochester, and of the recorders' courts of the cities of Buffalo and Utica, shall extend to the following actions:

1. To the actions enumerated in section 103, when the cause of action shall have arisen, or the subject of the action shall be situated, within those cities, respectively;

2. To all other actions, where all the defendants shall reside or be personally served with the summons, within those cities, respectively;

3. To actions against corporations, created under the laws of this state, and transacting their general business, or keeping an office for the transaction of business, within those cities, respectively, or established by law, therein.

§ 40. The superior court of the city of New-York shall also have power to review the judgments of the marine court of the city of New-York, and of the assistant justices' courts in that city.

The jurisdiction of these courts is scattered through a mass of special statutes, which it is neither necessary nor profitable to review. They will be found collected in 2 *R. S.* 3d ed. 272-317. In one essential particular, which is preserved in this title, their powers are the same,—namely, in local actions arising within their localities, and in transitory actions, wherever they may have arisen, subject, however, to the general power of the supreme court, as provided by the judiciary act, (1 *Laws of 1847*, p. 333, sec. 49,) to order an issue of fact joined in any court whatever, to be tried in any other county, on good cause shewn, and on such terms as it may prescribe. In this particular, we propose to continue the jurisdiction of these courts, substantially as at present, with such variations of language only, as are rendered necessary by the proposed change in relation to actions and their incidents. This is sufficiently accomplished by the first subdivision of section 39.

The other subdivisions of that section limit the jurisdiction of these courts in all other actions, to cases where all the de-

defendants reside, or are personally served with the summons within the local jurisdiction of the court ; and in actions against corporations, to cases where they transact their general business, or keep an office for the transaction of business, or are established by-law, within the locality. This provision is necessary, inasmuch as, by subsequent provisions, the summons may be served without the jurisdiction of the court, by publication. But for this provision, therefore, the plaintiff might in any case proceed against the defendant in a local court, though the defendant neither resided nor was served with the summons, nor did the cause of action arise, within its local jurisdiction.

Some of the local courts, out of the city of New-York, embraced in this title, have at present the right to review the judgments of justices' courts, upon appeal and *certiorari*. This jurisdiction we have proposed, in the title, "Of appeals," and also by the first subdivision of section 33, (p. 37,) to transfer exclusively to the county courts. There being no county court in the city and county of New-York, we propose to continue the power of the superior court to review the judgments of the local and inferior courts in that city. And, as will be hereafter seen, we have substituted for the present mode

§ 41. The superior court of the city of New-York, and the court of common pleas, for the city and county of New-York, shall, within twenty days, appoint general and special terms of those courts respectively, and prescribe the duration thereof; and they may, from time to time, respectively, alter such appointments; and hereafter no fee shall be paid for any service of a judge of either of those courts.

§ 42. A general term shall be held by at least two of the judges of those courts respectively, and a special term by a single judge.

§ 43. Judgments upon appeal shall be given at the general term ; all others, at the special term.

§ 44. The concurrence of two judges shall be necessary to pronounce a judgment at the general term. If two do not concur, the appeal shall be reheard.

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## TITLE VI.

### Of the Courts of Justices of the Peace.

SECTION 45. Repeal of certain existing provisions.

46, 47. Jurisdiction of these courts.

48-55. Proceedings where title to real property comes in question.

56. Docketing their judgments, and effect thereof.

57. Provisions of this act, as to forms of action and pleading, applicable to these courts.

This title is intended to make such alterations only in the justices' court acts, as are rendered necessary by dispensing with the forms of action, by abolishing actions upon judgments, and by introducing a new system of pleading. A brief explanation will be sufficient to show the manner in which this object is attained.

◆ We commence by proposing, by section 45, to repeal the existing statutory provisions, conferring the jurisdiction of these courts, with reference to the existing forms of action; (2 *R. S.*, 3d ed. 324, 325, sec. 1—5;) and we substitute in their place, sections 46 and 47, by which the existing jurisdiction is retained, with reference to the substance, instead of the form of the action.

In the next place, we propose by section 45, to repeal the existing provisions, applicable to cases where title to real property comes in question, in actions in those courts, (2 *R. S.*, 3d ed., 334, 355, sec. 60—67,) and to substitute from section 48 to 55, inclusive, in their stead.

given for the sum actually due. Where the payments are to be made by instalments, an action may be brought for each instalment, as it shall become due ;

6. An action upon a surety bond taken by them, though the penalty or amount claimed exceed one hundred dollars.

§ 47. But no justice of the peace shall have cognizance of an action :

1. In which the people of this state are a party, excepting for penalties not exceeding fifty dollars ;

2. Nor where the title to real property shall come in question, as provided by sections 48 to 55, both inclusive ;

3. Nor of an action for an assault, battery, false imprisonment, libel, slander, malicious prosecution, criminal conversation, or seduction ;

4. Nor of a matter of account, where the sum total of the accounts of both parties, proved to the satisfaction of the justice, shall exceed four hundred dollars ;

5. Nor of an action against an executor or administrator, as such.

§ 48. In every action brought in a court of a justice of the peace, where the title to real property shall come in question, the defendant may, either with or without other matter of defence, set forth in his answer, any matter showing that such title will come in question. Such answer shall be in writing, signed by the defendant or his attorney, and delivered to the justice. The jus-

tice shall thereupon countersign the same, and deliver it to the plaintiff.

§ 49. At the time of answering, the defendant shall deliver to the justice a written undertaking, executed by at least one sufficient surety, and approved by the justice, to the effect that if the plaintiff shall, within thirty days thereafter, deposit with the justice a summons and complaint in an action in the supreme court, for the same cause, the defendant will, within ten days after such deposit, give an admission in writing of the service thereof. Where the defendant was arrested in the action before the justice, the undertaking shall further provide, that he will, at all times, render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein. In case of failure to comply with the undertaking, the surety shall be liable, not exceeding one hundred dollars.

§ 50. Upon the delivery of the undertaking, to the justice, the action before him shall be discontinued, and each party shall pay his own costs. The costs so paid by either party shall be allowed to him, if he recover costs in the action to be brought for the same cause in the supreme court. If no such action be brought within thirty days after the delivery of the undertaking, the defendant's costs before the justice may be recovered of the plaintiff.

§ 51. If the undertaking be not delivered to the justice, he shall have jurisdiction of the cause, and shall

proceed therein ; and the defendant shall be precluded, in his defence, from drawing the title in question.

§ 52. If, however, it appear on the trial, from the plaintiff's own showing, that the title to real property is in question, and such title shall be disputed by the defendant, the justice shall dismiss the action, and the plaintiff shall pay the costs.

§ 53. When a suit before a justice shall be discontinued by the delivery of an answer and undertaking as provided in sections 48, 49 and 50, the plaintiff may prosecute an action for the same cause, in the supreme court, and shall complain for the same cause of action only, on which he relied before the justice ; and the answer of the defendant shall be the same which he made before the justice.

§ 54. If the judgment in the supreme court be for the plaintiff, he shall recover costs. If it be for the defendant, he shall recover costs ; except that upon a verdict, he shall pay costs to the plaintiff, unless the judge certify that the title to real property came in question on the trial.

§ 55. If, in an action before a justice, the plaintiff have several causes of action, to one of which the defence of title to real property shall be interposed, and as to such cause, the defendant shall answer and deliver an undertaking, as provided in sections 48 and 49, the justice shall discontinue the proceedings as to that cause, and the plaintiff may commence another action in the

supreme court therefor. As to the other causes of action, the justice may continue his proceedings.

§ 56. A justice of the peace, on the demand of a party in whose favor he shall have rendered a judgment, shall give a transcript thereof, which may be filed and docketed in the office of the clerk of the county where the judgment was rendered. The time of the receipt of the transcript by the clerk, shall be noted thereon and entered in the docket; and, from that time, the judgment shall have the same effect, as a lien, and be enforced in the same manner, as a judgment of a county court. A certified transcript of such judgment may be filed and docketed in the clerk's office of any other county, and with the like effect, in every respect, as in the county where the judgment was rendered; except, that it shall be a lien, only from the time of filing and docketing the transcript.

§ 57. The provisions of this act, respecting forms of action, pleadings, and the rules of evidence, and the times of commencing actions, shall apply to the courts of justices of the peace, except that the pleadings may be oral, and made at the same time as if this act had not been passed.

## TITLE VII.

### **Of Justices' and other Inferior Courts in Cities.**

#### **CHAPTER I. THE MARINE COURT OF THE CITY OF NEW-YORK.**

#### **II. THE ASSISTANT JUSTICES' COURTS IN THE CITY OF NEW-YORK.**

#### **III. THE MUNICIPAL COURT OF THE CITY OF BROOKLYN; AND THE JUSTICES' COURTS OF THE CITIES OF ALBANY, TROY AND HUDSON.**

#### **IV. GENERAL PROVISIONS.**

The remarks which have been already made, upon the title relating to the superior court and common pleas in the city of New-York, and to the mayors' and recorders' courts in other cities, (p. 53,) are to a great extent applicable to the courts embraced in this title. Their jurisdiction, in nearly every instance, is conferred by the existing statutes, with reference to the forms of action; and (with the exception of the city of New-York,) their powers are designed to be the same, though conveyed, in the different statutes creating them, in terms unnecessarily variant. In presenting the revision contained in this title, we have, for the present, refrained from going further than to establish the jurisdiction of these courts with reference to the substance of the action, instead of its form. Where the difference between their jurisdictions is unessential, we have assimilated their powers; and for the reasons stated in the introductory note to the sixth title, (p. 55—57,) have applied to them the provisions of that title in relation to forms of action and pleading, to filing and docketing transcripts of their judgments, their effect and the mode of enforcing them, and to proceedings where title to real property is in question.

## CHAPTER I.

### THE MARINE COURT OF THE CITY OF NEW-YORK

#### SECTION 58. Its jurisdiction.

§ 58. The marine court of the city of New-York shall have jurisdiction in the following cases, and no other :

1. In actions similar to those in which courts of justices of the peace have jurisdiction, as provided by sections 46 and 47.

2. In an action upon the charter or a by-law of the corporation of the city of New-York, where the penalty or forfeiture shall exceed twenty-five dollars, and not exceed one hundred dollars.

3. In an action between a person belonging to a vessel in the merchant service, and the owner, master or commander thereof, demanding compensation for the performance, or damages for the violation, of a contract for services on board such vessel, during a voyage performed, in whole or in part, or intended to be performed, by such vessel, though the sum demanded exceed one hundred dollars.

4. In an action by or against any person belonging to or on board of a vessel in the merchant service, for an assault and battery or false imprisonment, committed on board such vessel, upon the high seas, or in a place without the United States, of which the ordinary courts of law of this state have jurisdiction, though the damages demanded exceed one hundred dollars. But nothing in this or the last preceding subdivision of this

section, shall give the court power to proceed in any of the cases therein referred to, as a court of admiralty or maritime jurisdiction.

The second and third subdivisions of this section, embrace the peculiar jurisdiction of this court, and are carefully condensed from 2 *R. L. of 1813*, p. 381, 382, *sec. 106*.

## CHAPTER II.

### THE ASSISTANT JUSTICES' COURTS, IN THE CITY OF NEW-YORK.

#### SECTION 59. Their jurisdiction.

§ 59. The assistant justices' courts in the city of New-York, shall have jurisdiction in the following cases, and no other :

1. In actions similar to those in which justices of the peace have jurisdiction, as provided by sections 46 and 47; such jurisdiction, however, to be limited to cases where the sum due or claimed, or the judgment confessed, shall not exceed fifty dollars.
2. In an action upon the charter or a by-law of the corporation of the city of New-York, where the penalty or forfeiture shall not exceed fifty dollars.

## CHAPTER III.

### THE MUNICIPAL COURT OF THE CITY OF BROOKLYN, AND THE JUSTICES' COURTS OF THE CITIES OF ALBANY, TROY AND HUDSON.

#### SECTION 60. Their jurisdiction.

§ 60. The municipal court of the city of Brooklyn, and the justices' courts of the cities of Albany, Troy and Hudson, respectively, shall have jurisdiction in the following cases, and no other :

1. In actions similar to those in which courts of justices of the peace have jurisdiction, as provided by sections 46 and 47.

2. In an action upon the charter or by-laws of the corporations of their cities respectively, where the penalty or forfeiture shall not exceed one hundred dollars.

## CHAPTER IV.

### GENERAL PROVISIONS.

#### SECTION 61. Sections 48—57 applied to these courts.

§ 61. The provisions of sections 48 to 57, both inclusive, relating to forms of action, to pleadings, to the times of commencing actions, to the rules of evidence, to filing and docketing transcripts of judgments, to their effect and the mode of enforcing them, and to proceedings where title to real property shall come in question, title ; except, that after the discontinuance of the action

shall apply to the courts embraced in this title ; except, that after the discontinuance of the action in the inferior court, upon an answer of title, the new action may be

This section has been already sufficiently explained, in considering the provisions which it is proposed to apply to the courts embraced in this title, excepting the concluding provision. The exception there made, is intended to permit the plaintiff, where an action is discontinued in an inferior city court, to commence his new action in the mayor's or recorder's court of the same city, if such a court exist. It forms an exception, in this respect, to the provision relative to the courts of justices of the peace. In respect to them, as has been seen, the provision as to the new action, requires that it shall be commenced in the supreme court; there being, (if our recommendation limiting the jurisdiction of the county courts to special cases, be adopted,) no court, except those specially established in cities, which have jurisdiction of actions involving the question of title to real property.

brought either in the supreme court, or in any other court, having jurisdiction thereof; and except, also, that in the city and county of New-York, a judgment, the transcript whereof is docketed in the office of the clerk of that county, shall have the same effect as a lien, and be enforced in the same manner as a judgment of the court of common pleas for the city and county of New-York.

# PART II.

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## OF CIVIL ACTIONS.

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- TITLE I. Of their Form.**
- II. Of the Time of Commencing them.**
- III. Of the Parties.**
- IV. Of the Place of Trial.**
- V. Of the Manner of commencing them.**
- VI. Of the Pleadings.**
- VII. Of the Provisional Remedies.**
- VIII. Of the Trial and Judgment.**
- IX. Of the Execution of the Judgment.**
- X. Of the Costs.**
- XI. Of Appeals.**
- XII. Of the Miscellaneous Proceedings, and general provisions.**

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### TITLE I.

#### Of the Form of Civil Actions.

- SECTION 62.** Distinction between actions at law and suits in equity, and forms of such actions and suits, abolished.
- 63.** Parties to an action, how designated.
- 64.** Actions on judgments, abolished.
- 65.** Feigned issues, abolished.

The chief object of this title is to declare the leading principles which lie at the foundation of the whole proposed system of legal procedure, and without which, in our judgment, very few, if any essential reforms can be effected in remedial law. We refer to the abolition of the distinction between actions at law and suits in equity, and of the

forms of such actions and suits. This principle it is proposed to declare by section 62, which provides that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished; and there shall be, in this state hereafter, but one form of action for the enforcement or protection of private rights, and the redress of private wrongs, which shall be denominated a civil action."

In our remarks upon this section we shall consider separately, the two propositions which it involves.

The first is, the abolition of the distinction between actions at law and suits in equity. The separate jurisdictions of law and equity, exercised by distinct tribunals, as they existed in this state up to the adoption of the new constitution, were borrowed from similar institutions in England, with such modifications, as the genius of our people rendered necessary. In the early history of the English law, there was but one system of jurisprudence, and one form of tribunal by which it was administered. We refer to the courts of common law. In the progress of time, the unbending rigor of common law rules was found to be a grievance, which rendered necessary the exercise of some judicial power, by which the severity of the common law might be relaxed. The establishment of the court of chancery, the original design of which was to soften the rigor of the common law, and to do complete and perfect justice, by means of the peculiar forms of proceeding with which it was invested, where injustice would otherwise have followed, was the result. In the exercise of its functions, new principles were adopted, new modes of proceeding devised, and powers, some of them exclusive of and others concurrent with the courts of law, became the means, by which its jurisdiction was administered.

With these attributes, that court was incorporated into the judicial establishment of this state; and until it was abolished by the new constitution, it continued to exist, and to exercise substantially the same powers as exercised by the court of chancery in England. Its forms and modes of proceeding, not

merely in enforcing the substantial rights of parties, but in the ordinary proceedings by which suits were conducted, were essentially different from those of the common law courts ; and not merely in the formal conduct of litigation, but in the substantial rules by which rights were to be determined, it had built up as distinct a system as it is possible to conceive. The result was, in this state, as it has ever been in England, since the separate establishment of this court, a conflict of jurisdiction, and a difference of judicial opinion, as to the precise boundary which separated the powers of law and equity ; leading to a call on the part of the people, for such a course of measures, as would ensure the attainment of substantial justice, and remove the embarrassments in the organization of the judiciary establishment, by which there was good reason to fear, it had too often been defeated.

In the course of the discussions in the convention, on this subject, upon the proposition to blend the two jurisdictions in one court, the confusion and injustice resulting from the former system of separate tribunals, was maturely considered, and resulted in the adoption, by an almost unanimous vote, of the provision of the constitution abolishing the court of chancery, and declaring that "there shall be a supreme court, having general jurisdiction in law and equity." (*Art. 6, sec. 3.*) A reference to the debates of that body, will show that this result was effected, by the conviction which was entertained, of the injustice of subjecting a party whose rights were involved, to the uncertain chances in the selection of the proper forum, by which they were to be determined. And it is not a little singular, that this important change in the judicial establishment of the State, owes its origin mainly to the fact, that this injustice was the result, rather of the modes of proceeding, than of the rules of determination adopted by the several legal and equitable tribunals. An eminent legal member of that body, whose opinions, probably, had great influence in confirming, if not in producing this result, presented this distinction in terms so clear and forcible, that we cannot forbear introducing them in this place.

“To understand this question,” said he, “it was necessary to look at what these things called law and equity are, as contradistinguished from each other. In strictness, there could not be said to be any such distinct systems as law and equity. They were more properly called two distinct systems of practice; the one called the practice at law, and the other the practice in equity. By the practice at law, a man was only enabled to recover a simple money demand—with the two exceptions of ejectment and replevin. In ejectment, the plaintiff may recover land—the thing itself; in replevin, he may recover a chattel—the thing itself; but in all other respects, a party can recover in the law practice, nothing but a sum of money. And to recover that, he must adopt one or other of five or six particular forms of action—very technical and special in form, and in which the pleadings are almost invariably fictitious, filled with false allegations from beginning to end. They bore, to be sure, a certain conventional relation to a truth, which they were supposed to represent; and which conventional relation was perfectly well understood by learned lawyers, and tolerably well understood by the profession generally, but which no layman would understand. For instance, if one were to rob him of his watch, the forms of pleading, at common law, would allow him to waive the force, and to bring an action for the value of the watch, as upon a purchase. He could charge, that on a certain day, he sold and delivered to the defendant, a certain watch, in consideration whereof, the thief promised to pay, when he should be thereto requested, as much as such watch was reasonably worth; and that it was reasonably worth two hundred and fifty dollars. The defendant would answer, *non assumpsit*—that he did not so promise. Every word in the declaration would be false, and the plea would be manifestly true; and yet there was no judge in the land, that would not instruct the jury, that though this was a very outrageous act, the party whose watch it was, had a right to waive the wrong, and to have twelve men say, on their oaths, that the defendant did promise to pay, what the watch was reasonably worth, in manner and form as he had alleged, and that their verdict must be for the plaintiff. This was a *very fair specimen of the fictions which existed in the common*

law modes of pleading. He could consume hours, in giving similar instances ; but one was sufficient. Indeed, almost throughout, the allegations in the declaration are false to every common and ordinary intent. But they were said to be technically true ; because, by construction of law, the relation between the fiction in the pleadings, and the truth it represented, was well understood by lawyers and judges ; and between them, they could instruct the jury, to bring in such a verdict, as worked out the ends of justice.

“It might be asked, why such forms were adopted. Their origin was of remote antiquity ; but there was no doubt of the true reason. Jurors were originally very ignorant, and it was necessary, by special and strict forms, to bring down questions in issue to a very nice and simple point. And these pleadings were modified, from time to time, until they had received the character that was now impressed on them. They received their form, at that period, when a scholastic pedantry had overrun and perplexed, with its arbitrary rules, every branch of science. And hence, of course, a very special system of pleadings came to be adopted. It was, however, wholly inadequate to the ends of justice ; and because it was, the system of equity jurisprudence was adopted to supply its defects. That was equity practice. Under legal practice, a man could not get a discovery from his adversary ; could not reach documents ; nor get specific relief, except in a few cases.

“To obviate these defects in the law, a clerical chancellor introduced the civil law practice ; a practice, which, however disfigured in some places by unnecessary forms—however disfigured at this day by extreme prolixity—was nevertheless, in its own nature, flexible, highly convenient, and capable of being made to answer all the ends of justice. There was literally no form about it. The party stated his case, and asked the relief he desired ; and the court, if he proved his case, gave him that relief. Under this practice, any suit for any kind of remedy may be brought. It was always quite easy, by bill in chancery, to sue on a promissory note. Yet, as the English courts of common law had jurisdiction of the action, and chancery had no jurisdiction where relief could be had at law, chancery was never permitted

sought. If it were necessary, scores of cases might be cited, in which, after a long and protracted controversy upon the merits, the cause ultimately turned upon the question of mistaken jurisdiction.

Nor is the view of the subject, which has here been presented, peculiar to the discussion which it has undergone in this state. The attention of jurists in England,—the only country in Europe in which this distinction of jurisdictions exists,—has been directed to its consideration. In his great speech upon law reform, Lord *Brougham*, in discussing the subject of proceedings in the courts of justice, presented, as one of the prominent points for the consideration of parliament, the abolition of the distinction to which we have referred; and urged the adoption of the principle, that “no party should be sent to two courts, where one is able to afford him his whole remedy; nor to a dearer and bad court, when he can elsewhere have a cheaper and better remedy; nor should any one be obliged to come twice over to the same court, for different portions of his remedy, which he might have all in one proceeding.”

It is, however, no part of our purpose to present the principle of an union of law and equity jurisdiction, upon a broader basis than that which has reference to their forms of proceeding. It is enough for us to know, that the fundamental law has united these functions in one tribunal; and in recommending to the legislature a system of practice, by which those functions may be conveniently exercised, it is only necessary that we should take care not to encroach upon substantial rights. Keeping in view the distinction between rights, on the one hand, and the means of their ascertainment and enforcement, on the other, the only question is, whether a mode of proceeding, common to all civil controversies, whether known as legal or equitable, can be safely and conveniently prescribed.

The object of every suit, so far as modes of proceeding are concerned, is to place the parties whose rights are involved in it, in a proper and convenient form, before the tribunal by which they are to be adjudicated; to present their conflicting allegations, plainly and intelligibly to each other and to the

court; to secure by adequate means a trial or hearing of the contested points; to obtain a judgment or determination adapted to the justice of the case; and to effect the enforcement of that judgment, by vigorous and efficient means. This object is not peculiar to any form of remedy, whether it be legal or equitable, or whether it fall within any one of the subordinate classes of actions, as they now exist at law, but is common to all. That it can be practically attained in every species of controversy, so far as the mere formal and progressive steps in the conduct of suits is concerned, we are thoroughly convinced; and with a confidence, we trust not unbecoming, we present the subsequent provisions of the proposed act, as well adapted to carry out that object.

Without intending to anticipate the discussion of its provisions in their appropriate places, we may here briefly advert to some points, in which the assimilation of law and equity procedure has been supposed by some, to be attended with insurmountable difficulties.

The first of these is the subject of *pleading*. The distinguishing feature now existing between pleadings at law and in equity is, that in the former, the professed object is, by concise and formal statements of conclusions of fact, to bring the cause to a distinct issue, either of fact or of law,—while in the latter, the facts of the case may be stated without technicality, and with a minuteness of circumstantial detail, tending to establish the proposed conclusion of fact, in a manner forbidden by the rules of pleading, which prevail in the courts of law. This distinction, so far as equitable pleading is concerned, has resulted mainly from the peculiar power of a court of equity in enforcing discovery in aid of the relief sought, and in the necessity which existed for minute detail, in order more effectually to probe the conscience of the defendant. At law, with some unimportant statutory exceptions, no such power exists; and hence, nothing but *conclusions* of fact have either been permitted or required in pleading. We propose to reduce the system of pleading to one of *allegation* merely, without reference to discovery, in the mode which will presently be sug-

gested; so that the same form of allegation may be adapted to cases which have heretofore been distinguished as legal and equitable. And in order to prevent any prejudice which might otherwise result from the necessity now existing in equity, for the kind of pleading to which we have referred, we present a series of enactments, providing that in all cases, either party may obtain from the other a discovery under oath, of all facts necessary to the prosecution or defence of the action.

The second point of objection urged to the proposed assimilation of practice, is the mode of trial. The constitution has provided by the second section, of article first, that "the trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever; but that a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law;" and by the tenth section of the sixth article, that "the testimony in equity cases shall be taken in like manner as in cases at law." Under these sections, the legislature have power to provide literally for references in all cases in which that right has heretofore existed, as well in cases of a strictly legal character, as in those of an equitable nature, which they deem can be more conveniently investigated in that mode. In reference to the exercise of this power, we have provided for modes of trial by a jury, by the court and by referees, in such a manner, as to render this branch of procedure beneficial and convenient.

The third consideration connected with this subject is, the existing differences, in the form of judgment, and the means of enforcing it, peculiar to the courts of law and equity. Judgments in the former are, with very few exceptions, compensatory, while in the latter, in a majority of cases, they embrace specific relief peculiar to each case. It is a leading feature of our proposed plan, to require in all cases a judgment adapted to the established rights of the parties; and we can see no difficulty in incorporating into it, as a portion of an uniform system of practice, a form of execution which shall adapt itself to the judgment.

Independently therefore, of the express declaration of the *legislative will*, requiring us to provide "for an uniform course

of proceeding in all cases, whether of legal or equitable cognizance," we can see no difficulty which cannot be readily overcome, in the accomplishment of this object; while in accordance with the direction thus given us, we can perceive no just reason, for preserving a distinction in the modes of proceeding,—the tribunal in either case being the same. The legislature, in adopting this provision, no doubt acted upon the well known fact, that in many cases, without reference at all to the merits of the controversy, parties had been turned out of courts of equity, because they should have gone into courts of law, and out of courts of law, because they should have gone into equity. They no doubt also correctly interpreted the constitution, which had abolished a separate court of equity, and transferred general jurisdiction in law and equity to the supreme court, when they instructed us to provide for a system of procedure which should obviate the evil referred to, and secure the protection of rights, without reference to unnecessary and unmeaning forms.

The second branch of the section in question, proposes to abolish the distinctions between the several forms of actions at law, and of suits in equity.

At common law, the grand division of civil actions was into *real*, *personal* and *mixed*; *real* actions being such as were brought for the specific recovery of lands, tenements or hereditaments; *personal* being those, which were brought for the specific recovery of goods and chattels, or for pecuniary compensation for the non-payment of a debt, or for the breach or non-performance of a contract, obligation or duty, or for the commission of any other private injury, of whatever description; and *mixed* actions being such as partook, in some degree of the nature of both the former, and therefore properly reducible to neither of those definitions, and which were brought both for the specific recovery of lands, tenements, and hereditaments, and for damages for injuries sustained in respect to property of that description.

In the revision of the statutes of this state, (2 *R. S.*, 3d ed., 390, sec. 1,) these general divisions of actions underwent some slight change, and were distributed into;

1. Such as relate to real estate;
2. Those which may be brought for the recovery of any debt or demand, or for the recovery of damages only;
3. Those which may be brought for penalties or forfeitures.
4. Suits in courts of equity.

This provision was designed to comprehend under the head of actions relating to real estate, those which were formerly known as real and mixed actions; and under the denomination of personal actions, those which were brought for the recovery of a debt or demand, or of damages only, or for penalties and forfeitures, as well as those which sought the specific recovery of personal property. When it was adopted, real and mixed actions existed in this state as at common law; and, though of rare practical occurrence, were extremely numerous, and attended with forms of an exceedingly intricate and complicated character. Under the general classification above referred to, however, all actions relating to real estate were reduced to the heads of ejectment, proceedings to compel the determination of claims to real property, partition, writ of nuisance, waste, trespass on lands, and proceedings to discover the death of persons upon whose lives any particular estate may depend. (2 R. S. 3d ed. 399—439.)

These actions and proceedings, excepting the writs of nuisance and waste, which are still in their nature and mode of enforcement, of a mixed character, and trespass on lands, which, although relating to real property, is in its nature and form of proceeding, personal, are substituted in place of the ancient real action; it being provided by the chapter of the Revised Statutes just cited, and containing this new classification, that all writs of right, writs of dower, writs of entry and writs of assize, all fines and common recoveries, and all other real actions known to the common law, not enumerated and retained in that chapter, and all writs and other process heretofore used in real actions, not specially retained, should be abolished.

Personal actions, as they existed at common law, and as they are still retained in this state, are divided into actions *ex con-*

*tractu* and *ex delicto*. These again are subdivided, the former into actions of account, assumpsit, covenant, debt, annuity and *scire facias*; and the latter into trespass, trespass on the case, and replevin.

The action of account is maintainable against a guardian in socage, bailiff or receiver, to compel an account of profits or of moneys received by the defendant; and also in the case of two joint mercantile partners; it being necessary, however, that the plaintiff should name himself as *merchant*, and the defendant also as *merchant*, and should charge the defendant as receiver of the moneys of the plaintiff. It may also be maintained, by statute, by one joint tenant or tenant in common of real estate, against another for receiving more than his just share or proportion.

Assumpsit is the form of remedy, by which a compensation in damages may be recovered, commensurate with the injury sustained by the breach or violation of any contract not under seal nor of record, whether express or implied, written or verbal, for the payment of money, or for the performance of an act not prohibited, or the omission of the performance of an act enjoined by law.

Covenant is the appropriate action for the recovery of damages, for the breach of an engagement under seal,—to do or not to do a particular thing, as to pay a sum of money, to build a house, or the like; and in this respect the rule is the same as in respect to parol contracts,—that the act which is done must not be in contravention of, and the act omitted must be one, the performance of which is enjoined by law. As to what constitutes an agreement under seal,—or as it is denominated, a specialty, in contradistinction from a simple contract, which term comprises contracts not under seal or of record,—it is to be observed, that the mere putting a seal to an instrument, even though it be a promissory note, changes the nature of the contract, and makes that a covenant, which would otherwise have been a simple contract or promise.

Debt is the appropriate action for money due on a legal liability, or upon a simple contract, express or implied, or upon

a contract under seal or of record, whenever the demand is for a sum certain, or capable of being reduced to a certainty.

Annuity is the form of remedy for the recovery of an annuity, or yearly payment of a sum of money granted to another in fee, or for life or years, charging the person of the grantor only; and it may be brought by the grantor or his heirs, or his or their grantee, against the grantor, or his heirs.

A *scire facias* is a judicial writ, founded upon a record, such as a judgment or recognizance,—requiring the party against whom it is brought, to shew cause, why the party bringing it should not have the benefit of such record. For example, it lies where execution has not been sued out on a judgment within two years; or to revive a judgment against the representatives of a deceased defendant; or by the representatives of a deceased plaintiff; or where the situation of either party is changed by marriage; or to continue a suit by or against the representatives of either party, who shall have died during its pendency.

Trespass (regarded as a personal action,) may be brought for an injury accompanied by force, to the person; such as assault, battery, and false imprisonment; or to personal property, either in carrying it away, or destroying or otherwise injuring it.

Trespass on the case is the most comprehensive action known to the law. It includes within its operation, nearly every injury to personal rights, whether resulting from a violation of express or implied duty or obligation, tending either to the withholding of a right or the actual commission of a wrong. Indeed, if we except the cases already referred to, where the remedy by the action of account, covenant, debt or *scire facias*, is applicable, it may be said to comprise, or at all events, to be concurrent with, every other personal remedy. For example, it applies to injuries to the person, whether with or without force, and affecting either the character, the safety, or the health or quiet of the plaintiff; or to the personal rights of the plaintiff, and resulting from negligence, deceit or the like,

or from seduction or criminal conversation ; or to his property, by its conversion, which is remediable by what is denominated the action of trover.

The action of replevin lay originally at common law, for the specific recovery of the property of the plaintiff, which had been taken by distress; and had for its object, as it now has, the immediate re-delivery of the property to the plaintiff, upon sufficient security to make good his claim. It has been gradually extended, until it has now become the common, as it is the only remedy, for the recovery of the possession of personal property, wrongfully taken or withheld.

Within some one of these forms of action, every injury to personal rights, which is the subject of legal redress, must be brought; and the failure to select the one which is strictly appropriate, is as fatal to the rights of the party, as his failure to sustain the merits upon which his claim to redress is founded. There is no branch of legal science upon which so much curious, and we may be permitted to add, unnecessary learning has been expended, as in the attempt to define the precise boundaries which distinguish these various forms of action; and the absurdities by which their early history and their present retention are attended, are full of instruction as to the necessity for a deliberate inquiry, into the propriety of their further continuance. They are referred back, by some of the elementary writers, to the sanction of the king's original writ, which formerly was, and even now, by fiction of law, is an essential preliminary form to the institution of a suit in the common law courts; and which, from the fact, that, from the most ancient times, it defined and determined the form of action, rendered the forms of *writs* and *actions* correlative terms, and led to the result that the former were regarded as evidence of the right.

Mr. *Stephen*, (one of the ablest commentators upon and defenders of this system,) refers to various conflicting authorities as to the antiquity of these writs; which he regards, not only as essential *formulae* for the institution of a suit, but as connected with the whole scheme of actions, and as having an important relation to pleading, especially. After remarking that it

is known that some of these writs are at least as ancient as the time of Henry II., (being found in the work of *Glanville*, who wrote in that king's reign,) he observes, that the student will in vain search the books of the science, for any distinct and satisfactory history of their original invention.—“It is said on high authority,” says he, “that the more common and ordinary writs were, *de communi consilio totius regni, concessa et approbata* ; and also that some writs existed long before the conquest.”

Another learned writer, (Lord Chief Baron *Gilbert*,) asserts that the more ancient of them were brought from Normandy. And these vague and somewhat inconsistent statements, seem to constitute the whole substance of the information to be derived from the English writers on the subject. A learned jurist of our own country, however, (Judge *Cushing*, of Massachusetts,) has carefully examined the subject, and has presented a condensed history of these writs, as constituting the basis of the present forms of action; to the results of which we deem it not out of place to refer.

From their introduction into England by the Normans, the forms of writs, for many years after the Norman conquest, were devised, and the writs themselves issued by the king's chancellor and the clerks in chancery. The chancellor was the keeper of the king's great seal, by which all writs, as well as other documents emanating from the king, were authenticated. For the purpose of performing this duty, it is stated by one of the most ancient writers on the English law, that certain honest and discreet clerks, sworn to the king, were associated with the chancellor, and that by reason of their being more fully informed in the laws and customs of England, it was made their duty to hear and examine the petitions and complaints of suitors, and upon the quality of injuries shewn by them to provide due remedy by the writs of the king, which were denominated *brevia*.

The mode of proceeding, by means of writs framed and issued as above mentioned, so far as it is necessary to be here stated, seems to have been the following:—when any one had received an injury, for which he wished to obtain redress, he

made application or petition to the king himself, as the fountain of justice, or rather to the chancellor,—then, as now—denominated the keeper of the king's conscience; and the chancellor, or his clerks, upon the plaintiff's statement of his case, framed or selected a writ, adapted to the redress of the injury sustained. This writ was nothing more than a letter, containing a brief statement of the plaintiff's claim, addressed, in the king's name, to the sheriff of the county, where the injury occurred; *in some cases*, (3 *Bl. Com.* 274,) directing him to command the defendant, to satisfy the plaintiff's claim, and if the defendant failed to comply, then to summon him to appear before the king's justices, to show why he had not done so; and, *in other cases*, (3 *Bl. Com.* 274,) merely directing the sheriff, without any previous command to the defendant, to summon him to appear as above, provided the plaintiff should give the sheriff security effectually to prosecute his claim. If the defendant, in the first class of cases, obeyed the command of the king, there was an end of the matter. If he did not, the sheriff commanded him to appear, as by the direction of the writ, and account for his non-compliance. The sheriff then endorsed a statement of his proceedings on the writ, and returned it to the court or justices specified. The same course was pursued, in the other class of cases; except that the sheriff did not command the defendant to satisfy the plaintiff's claim, but summoned him in the first instance, upon receiving security from the plaintiff.

These writs being thus returned, not to the chancellor, by whom they were issued, but to some other of the king's courts or justices, operated as a commission, directed by the king to his judges, to determine the controversy between the parties. They were called *original writs*. If the defendant appeared, according to the requisition, the plaintiff stated his case anew to the court, in a declaration, or statement of the facts upon which his claim or demand was founded. If the defendant did not appear, a new process was then issued, (not by the chancellor, but by the judge or the court, to whom the original writ, issued by the former, had been returned,) against the person or property of the defendant, with a view to compel

him to appear. This was denominated a *judicial writ*. The process, thus issued by the court, to compel the defendant to submit himself to its jurisdiction, agreeably to the command of the king,—and all the subsequent proceedings,—including the plaintiff's declaration, the defendant's answer, (the *pleadings*, as they were called,) closely followed, or rather repeated the *original writ*, in the statement of the plaintiff's case. The forms of the original writs, which were devised and issued by the chancellor and his clerks, were inserted in a book kept in the chancery, called the register of writs, and preserved as precedents for future cases.

“When these forms had accumulated to such a number, as to provide for the most obvious cases of wrong, some of them were denominated *de cursu*, or writs of course; which seem to have been issued from the chancery, upon the applicant's finding pledges, paying the customary fees, and swearing to the truth of his allegations: and according to Fleta, the writs *de cursu* attained such a degree of authority, as precedents, that they could not be altered, but by the parliament. In the twelfth year of Henry III., the forms and precedents of all the writs *de cursu* then in use, which were transmitted by that king to Ireland, for the administration of justice in that country, were fifty-one in number. These writs *de cursu* seemed to have sufficed for the ordinary demands of suitors, and probably rendered the interference of the chancellor, in the formation of new writs, less frequent than in former times. Whether it was in consequence of the infrequent exercise of this power,—or the breaking up of the old court into distinct judicatures,—or the authority of the old forms, regarded as precedents,—or from some other cause which can now only be conjectured,—it seems, that early in the reign of Edward I., it was doubted, whether the clerks of the chancery had authority to devise new forms to meet the exigency of new cases; and it was therefore provided, by a statute enacted in the thirteenth year of that king, “that, as often as it shall happen, in the chancery, that in one case a writ is found, and in a *like case*, (*in consimili casu*,) falling under the same right, and requiring

the like remedy, no writ is to be found, the clerks of the chancery shall agree in making a writ, or adjourn the complainants until the next parliament, and shall write the cases in which they cannot agree, and refer them to the next parliament; and by the agreement of men learned in the law, a writ shall be made, lest it should happen, that the court of the king should be deficient in doing justice to complainants." This statute was probably intended to relieve the chancery from all doubt, in regard to the power to devise new writs; but it seems to have been construed in an illiberal spirit: and the authority conferred by it was restricted, to the making of writs *in like cases* with those already provided for. It was not supposed to give or recognize any right to frame such instruments, for cases entirely new; which could therefore only be provided for by the authority of parliament. Many new writs, however, were framed under this statute, according to the principle contained in it, that is, in *like cases*, or upon the analogy of actions previously existing.

"One principal branch of the duties of the chancellor and his clerks, was, as has been seen, to receive applications or petitions, for the redress of legal injuries, and to furnish the petitioners with writs adapted to their respective cases. These instruments had, hitherto, been merely the means, by which the king's justices or courts were authorized to do justice to the petitioners. But now, they had assumed a new character; they were invested with the authority of precedents; were considered as evidences of the law; their form could not be changed; and no *new* one could be framed but by the aid of parliament. Plaintiffs still commenced their proceedings, by an application or petition in chancery, for the proper writ; but if none could be found in the register, adapted to the case, and if none could be framed under the statute above mentioned, the petitioner was without remedy, but by an act of parliament. The *register of writs*, instead of being a book of mere forms, to expedite business, and lighten the labor of the chancellor and his clerks, had now, without any express legislative sanction, become a *compendium of legal remedies*.

"If the defendant neglected to appear, in obedience to the original writ under the great seal, the court, to which it was returned, then issued a judicial writ, (in which the original was recited,) the object of which was to compel the defendant to appear. But as it often happened, that the defendant neglected to appear on the original, and the issuing of the judicial process thus became necessary, in almost all cases, it gradually became the practice to dispense with the *original*, and to commence the proceedings with the *judicial* process, in the first instance; the court being willing, in order to prevent delay, to *suppose* that the original writ had already been issued and returned. The judges, however, though they might evade, could not repeal the law. The original was still necessary, and the want of it might, in some cases, prove fatal to the plaintiff's cause. But it was permitted to be obtained afterwards, and filed in the court, "with a proper return thereupon," says Blackstone, "in order to give the proceedings a color of regularity." It became not unfrequent, also, for the saving of time, trouble and expense, to sue out even a second judicial writ, in the first instance; thus supposing not only an original, but a judicial writ, to have been sued out and returned; "and this fiction," the same author remarks, "being beneficial to all parties, was readily acquiesced in, and is now become the settled practice; being one among many instances, to illustrate the maxim of law, '*in fictione juris consistit æquitas*.'"

"When this practice became established, it completed an entire revolution in the mode of commencing an action. Plaintiffs no longer applied by petition, to the chancellor, for writs adapted to their respective cases; but the forms of writs were settled and fixed; they were granted by the proper officers of the court, as a matter of course, without inquiry or examination, upon payment of the established fees; and the selection or application of them, in practice, had become the science, if such it could be called, of the attorneys. When a party had sustained an injury, which required redress, he applied to his attorney, who determined upon the proper form of writ, and sued it out accordingly."

From the period of which we have been speaking—a period comparatively benighted and ignorant, in all that is valuable in science—to the present, these forms have been adhered to with a sort of bigoted devotion. While the principles of legal science have expanded and adapted themselves to the exigencies of each successive age, through which they have passed, we find ourselves met with the standing argument against improvement, that the time-honored institutions of ages must be held sacred, and that these forms, which may have been well suited to the age in which they originated, must be left untouched. Is there, in truth, any soundness in such a doctrine? Can it be possible, that the progress which has characterized almost every age since that period, and which is the distinguishing feature of the present day, must stop in its application to the machinery by which rights are to be vindicated and wrongs redressed?

While we are disposed to respect the opinions of those who differ from us, we cannot admit that these questions are difficult of solution. It seems to us, clear, that neither the forms of remedies, nor the mode in which they are stated, require the complexity, in which both are now enveloped. The embarrassments, to which they have given rise, have resulted from no difficulty in determining the real rights of parties, but simply in the means of enforcing them; and in this respect, we feel no hesitation in recommending, that the retention of forms, which serve no valuable purpose, should no longer constitute a portion of the remedial law of this state. Let our courts be hereafter confined in their adjudications to questions of substantial right, and not to the nice balancing of the question, whether the party has conformed himself to the arbitrary and absurd nomenclature, imposed upon him by rules, the reason of which, if they ever possessed that quality, has long since ceased to exist, and the continuance of which is a reproach to the age in which we live.

**§ 62. The distinction between actions at law and suits in equity, and the forms of all such actions and suits, here-**

tofore existing, are abolished ; and, there shall be in this state, hereafter, but one form of action, for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated a civil action.

§ 63. In such action, the party complaining shall be known as the plaintiff, and the adverse party as the defendant.

§ 64. No action shall be brought upon a judgment rendered in any court of this state, (except a court of a justice of the peace,) between the same parties, without leave of the court for good cause shown, on notice to the adverse party ; and no action on a judgment rendered by a justice of the peace, shall be commenced within two years after its rendition, except in case of his death, resignation, incapacity to act, or removal from the county.

issue upon a judgment until after thirty days, and even then, a return cannot be compelled within sixty, yet the judgment debtor may be sued upon the judgment, without the delay of a day. Nay, the party may continue suing upon the judgment, (so it has been held by one court, at least,) till the expenses, heaped upon expenses, exceed the original debt. It is no answer to say, that this is not often done ; the law permits it, and advantage is sometimes taken of the law. Not a word can be said in favor of so monstrous an abuse. This section will put an end to it.

§ 65. Feigned issues are abolished ; and instead thereof, in the cases where the power now exists to order a feigned issue, or when a question of fact, not put in issue by the pleadings, is to be tried by a jury, an order

for the trial may be made, stating, distinctly and plainly, the question of fact to be tried, and such order shall be the only authority necessary for the trial.

That it may be seen, what this will abolish, and what we propose to substitute instead, we subjoin the present pleadings on a feigned issue, and the form of the question, as we would have it stated. The pleadings are as follows :

**DECLARATION.**—*New-York, ss.*—John Doe complains of Richard Roe being in custody, &c., of a plea of trespass on the case ; for that whereas on the first day of May, in the year of our Lord one thousand eight hundred and forty-seven, at the city of New-York and county of New-York, a discourse was had and moved by and between the said John Doe of the one part and the said Richard Roe of the other part, of and concerning the title of one William Smith to certain lands in the town of Newburgh, in the county of Orange, which, by certain articles of agreement set forth in a certain bill of complaint filed in the court of chancery of the state of New-York, by the said William Smith against the representatives of Thomas Edwards, deceased, and proved in the said cause, the said William Smith had agreed to convey to the said Thomas Edwards in his life time, and to which the said William Smith claimed to derive title through one James Horton, and whether the said William Smith was or was not seised of an absolute estate of inheritance in the said lands, and whether a certain paper writing produced by the said complainant before Moses Hale, Esquire, one of the masters of the said court, upon the reference to him in the above cause, purporting to be a deed from Henry Simpson to Lewis Stiles, and to bear date on the sixteenth day of March, one thousand eight hundred and nine, was executed by the said Henry Simpson. And upon such discourse the said John Doe then and there asserted and affirmed, that the said paper writing, so produced before Moses Hale, Esquire, one of the masters of the said court, upon the reference to him in the said cause, purporting to be a deed

from Henry Simpson to Lewis Stiles, and to bear date on the sixteenth day of March, one thousand eight hundred and nine, was executed by the said Henry Simpson ; which said assertion the said Richard Roe then and there denied to be true, and then and there affirmed the contrary thereof ; and thereupon afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said John Doe, at the special instance and request of the said Richard Roe, had then and there paid to the said Richard Roe the sum of one hundred dollars lawful money of the United States, he the said Richard Roe undertook and then and there promised the said John Doe, to pay him the sum of two hundred dollars of like lawful money in case the said paper writing was executed by the said Henry Simpson, as he the said John Doe had asserted and affirmed as aforesaid. And the said John Doe in fact saith, that the said paper writing was executed by the said Henry Simpson as he the said John Doe had asserted and affirmed, to wit, on the same day and year, and at the place aforesaid, of which the said Richard Roe afterwards, to wit, on the same day and year and at the place aforesaid had notice. By reason whereof, the said Richard Roe became liable to pay to the said John Doe the said sum of two hundred dollars lawful money aforesaid, to wit, on the same day and year and at the place aforesaid ; and being so liable, he the said Richard Roe, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and promised the said John Doe to pay him the said sum of money, when he the said Richard Roe should be thereunto afterwards requested. Nevertheless, the said Richard Roe, although often requested so to do, hath not as yet paid to the said John Doe the said sum of two hundred dollars, above demanded, or any part thereof, but to pay the same to the said John Doe, the said Richard Roe hath hitherto wholly neglected and refused, and still doth neglect and refuse, to the damage of the said John Doe, of two hundred dollars, and thereof he brings suit, &c.

**PLEA.**—And the said defendant, by George Jones, his attorney, comes and defends the wrong and injury when &c., and says that the said plaintiff ought not to have or maintain his

aforesaid action thereof against him, because he says that true it is that such several discourses were had and moved, and that such several questions arose and were debated between the said plaintiff and the said defendant, and that the said defendant did undertake and promise in manner and form, as the said plaintiff hath above in his said declaration alleged; but the said defendant further says, as to the sum of two hundred dollars in the first count of the said declaration mentioned, that the said paper writing in the said first count mentioned, was not executed by the said Henry Simpson, in the said first count mentioned, as the said plaintiff hath in the said first count above alleged; and of this the said defendant puts himself upon the county, and the said plaintiff doth the like, &c.

The following is the form of the question, as we would have it stated :

**TITLE OF THE CAUSE.**—On motion, &c. It is ordered, that the following question of fact be tried at the circuit court, to be held, &c., viz :

Whether a certain paper writing, produced by William Smith, before Moses Hale, master in chancery, upon a reference to him, in the suit pending in that court, between the said William Smith and the representatives of Thomas Edwards, and purporting to be a deed from Henry Simpson to Lewis Stiles, and to bear date on the 16th day of March, 1809, was executed by the said Henry Simpson.

This is similar to the Scotch issues, which are remarkably neat and simple. The following is a specimen:

**STEWART vs. FRASER.**—This was a reduction of the sale of the estate of Belladrum, on the ground of misrepresentation. After various proceedings in the court of session, the case was sent to the jury court. The case was tried on the following issues:

“ Whether during the summer and autumn of the year 1826, and at what time in that period, the pursuer agreed to purchase

from the defender the estate of Belladrum, and to pay for the same the sum of £80,000 ?

“Whether the pursuer was induced by the misrepresentation of the defender, in regard to said estate, to enter into the said agreement ?”—(5 Murray’s Rep., 166.)

## TITLE II.

### Of the time of commencing civil actions.

#### CHAPTER I. ACTIONS, IN GENERAL.

##### II. ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

##### III. ACTIONS, OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

##### IV. GENERAL PROVISIONS.

This title, and the chapters enumerated under it, correspond, both in subject and arrangement, with the title of the revised statutes, “of the time of commencing actions.” (2 R. S. 3d ed., 391–399.) Their introduction in this place is rendered necessary, by the fact, that the existing limitations of actions, (with the exception of those relating to real property,) depend upon the distinctions between actions at law and suits in equity, and between the several forms of actions at law. To carry into effect, therefore, the abolition of those distinctions, it becomes necessary to revise the statute of limitations, and to adapt it to the substance, instead of the form, of the remedy. In the performance of this part of our duty, we have supposed that clearness of arrangement required, that the existing statute of limitations, instead of being amended by disjointed provisions, calculated rather to perplex than to aid the reader, should be embodied in an entire form, and in a natural and consecutive order. This has been done, by proposing to repeal all the provisions of the existing statute, excepting those relating to actions for the recovery of real property. These are retained, by a general provision, in section 68; they being of considerable length, and there being no alteration in them, which rendered it necessary to transcribe them in the present act.

In examining this subject, many important changes, both in its general policy and in its details, have suggested themselves to our minds, some of which we have proposed, and others of which, in the further progress of our labors, we may deem it expedient to submit for the consideration of the legislature. For the present, we have mainly confined ourselves to a mere revision of the existing statute of limitations, with such changes of phraseology, as seemed to be rendered necessary, by a due regard to simplicity of style, and by the judicial constructions given to portions of it, calculated to render its provisions more clear and explicit.

## CHAPTER I.

### THE TIME OF COMMENCING ACTIONS IN GENERAL.

SECTION 66. Repeal of existing limitations.

67. Time for commencing civil actions.

§ 66. The provisions contained in the second, third, fourth, fifth and sixth articles of the chapter of the revised statutes, entitled "of actions and the times of commencing them," are repealed, and the provisions of this title are substituted in their stead. This title shall not extend to actions already commenced, or to cases where the right of action has already accrued; but the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form.

The provisions proposed to be repealed by this section, are contained in 2 *R. S.*, 3d ed., 393—399; and are entitled, "of the time of commencing actions for the recovery of any debt or demand, or for damages only,"—"of the time of commencing actions for penalties and forfeitures,"—"general provisions concerning the commencement of suits, and the persons and

cases excepted from the operation of the preceding articles of this title,"—"of the presumption of payment, arising from the lapse of time;" and "of the time of commencing suits in courts of equity." These subjects are all embraced in the third and fourth chapters of this title; to the several sections of which are appended explanatory notes, shewing in what respects the existing statutes have been adhered to, or departed from, and, where the latter course has been adopted, the reasons which have rendered alterations necessary.

The concluding sentence of section 66 is designed to protect actions already commenced, or causes of action which have accrued, from the operation of this act, and is, in this respect, similar to the provision contained in 2 R. S. 3d ed. 398, sec. 45. The qualification has, however, been added, that "the statutes now in force shall be applicable to such cases, according to the subject of the action, and without regard to the form;" for the purpose of rendering the saving clause consistent with the enforcement of a remedy in causes of action already accrued, without regard to the distinctions now existing between cases of legal and equitable cognizance, or between the several forms of actions at law.

§ 67. The civil actions embraced within section 66, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, except where, in special cases, a different limitation is prescribed by statute.

Similar in form to 2 R. S., 3d ed., 397, sec. 43.

## CHAPTER II.

### THE TIME OF COMMENCING ACTIONS FOR THE RECOVERY OF REAL PROPERTY.

SECTION 68. Limitation of actions for the recovery of real property.

§ 68. The provisions of the Revised Statutes, contained in the article entitled "Of the time of commencing actions relating to real property," shall, until otherwise provided by statute, continue in force, and be applicable to actions for the recovery of real property.

The provisions proposed to be continued in force, are contained in 2 *R. S. 3d ed.* 391—393, *sec.* 1—15.

## CHAPTER III.

### THE TIME OF COMMENCING ACTIONS, OTHER THAN FOR THE RECOVERY OF REAL PROPERTY.

SECTION 69. Periods of limitation, prescribed.

- 70. Within twenty years.
- 71. Within six years.
- 72. Within three years.
- 73. Within two years.
- 74. Within one year.
- 75. When cause of action accrued, in an action upon a current account.
- 76. Actions for penalties, &c., by any person who will sue, when to be brought.
- 77. Actions for relief, not before provided for.
- 78. Actions by the people, subject to the same limitation.

§ 69. The periods prescribed in section 67, for the commencement of actions other than for the recovery of real property, shall be as follows :

§ 70. Within twenty years :

- 1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States.

## 2. An action upon a sealed instrument for the payment

This provision, as far as it goes, is founded on 2 R. S. 3d ed. 398, sec. 46—48. By those sections it was provided, that “presumption of payment should apply to all judgments of a court of record in this state rendered before the third of April, 1821, and to all such judgments rendered before the chapter containing the provisions took effect as a law, in the same manner as the presumption applicable to sealed instruments;” (*sec.* 46;) that “every judgment and decree thereafter rendered in any court of this state, or of the United States, or of any other state or territory within the United States, should be presumed to have been paid and satisfied, after the expiration of twenty years from the time of the signing and filing of the judgment; but that in a suit at law or in equity, in which the party against whom the judgment or decree was rendered, or his heirs or personal representatives, should be a party, the presumption might be repelled by proof of payment, or of written acknowledgment of indebtedness, made within twenty years, of some part of the amount recovered by the judgment or decree; and that in all other cases it should be conclusive;” (*sec.* 47;) and that after the expiration of twenty years from the time a right of action should accrue upon a sealed instrument for the payment of money, it should be presumed to have been extinguished by payment; but that the presumption might be repelled by proof of payment of some part, or by proof of a written acknowledgment of the right of action within that period. (*Sec.* 48.)

The section proposed differs from the existing statutes, in two important particulars.

*First*, it makes the lapse of twenty years an absolute bar, instead of a presumption of payment merely; and *secondly*, it excludes from the limitation, an action upon a judgment or decree of a court of this state, so as to conform it to the abolition of an action in any court of this state, upon such a judgment.

The propriety of the last of these changes is obvious, if the principle of abolishing actions upon judgments of the courts of this state be adopted.

The first involves only the expediency of making the lapse of twenty years an absolute bar, instead of leaving it as at present, a mere presumption of payment.

At common law, there was a presumption that a judgment debt, as well as debts of every other description, had been paid, after the lapse of twenty years, unless the creditor could show something to the contrary, to take the case out of the general rule. (*Opinion of Chancellor Walworth, in Miller v. Smith's ex'rs*, 16 Wend. 431.) The existing provisions, above referred to, merely declared the common law rule in this respect, by providing that the presumption of payment should apply to the cases enumerated in them. There seems to be no good reason, why the limitation of actions of this nature should not be as fixed and certain as in other cases—saving, of course, the rights of the plaintiff, either as respects disabilities to sue, or a revival of the debt by a new promise, as hereafter provided. The English Commissioners on the *Practice and Proceedings of the Superior Courts of Common Law*, in their Third Report, (p. 15, 16,) take this view of the subject, and recommend, in relation to actions on judgments, as well as on bonds and other deeds, (to which latter, as well as to actions on judgments there is no fixed legal limitation, but merely a presumption of payment,) that such limitation should be established. In referring to the subject of the statute of limitations, they say:—"This appears to be, in one respect, materially defective. Actions on simple contracts are subjected by statute, to an express limitation of six years. But with respect to bonds and other deeds, judgments and other matters of record, no statute of limitation exists. There is, consequently, no lapse of time, however long, which can be pleaded as a bar to the right of action upon them. But when a bond has been given, or a judgment has been in existence as much as twenty years, and no proof is given that interest has been paid, or the debt acknowledged within that period, nor any other circumstance shown, tending to rebut the supposition of payment, it has been thought reasonable in practice, to establish the rule that *payment must be presumed*. When, therefore, the bond or record is of that age, and no direct evidence can be given of payment, the course is, nevertheless, to plead that it has been paid, and to rely upon the pre-

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sumption. This is, however, an inconvenient substitute for a positive limitation. The shortest period for presumption, not being fixed by any absolute rule of law, is subject to variation; for, in some cases, less than twenty years has been held to be sufficient, when other circumstances existed, however slight, to fortify the presumption.

"This uncertainty is objectionable, and it would be better that parties holding such securities, should know precisely for what period they may forbear to enforce them, without affording any material ground for the presumption of payment. Besides, it has been truly stated, 'that the law of limitation is a wise and beneficial law, and designed not merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or become incapable of explanation, by the death or removal of witnesses.' (*By Story, J., in Bell v. Morrison*, 1 Peters' U. S. Rep. 360.) There are many cases, therefore, in which a jury may be satisfied that payment on a bond or judgment twenty years old has not in fact been made, when nevertheless, according to the true spirit of the law of limitation, the plaintiff ought not to be allowed to recover. Yet in such cases the jury are bound, under a plea of payment, to find the same in his favor. For these and other reasons, we think it right to recommend the establishment, by statute, of a positive bar; and the period of twenty years seems that which is best adapted to the case, both because it is already recognized in practice, and because an analogy is thus preserved to the law of limitation, in matters which concern the realty."

An additional reason for making the lapse of twenty years an absolute limitation, and not a mere presumption, is afforded by the existing statute, (2 R. S. 3d ed. 398, sec. 47,) which makes the presumption conclusive, unless repelled by payment, or a written acknowledgment within the twenty years.

**§ 71. Within six years:**

- 1. An action upon a contract, obligation or liability, express or implied; excepting those mentioned in section 70.**

This is a substitute for the provision contained in 2 R. S. 3d ed. 394, sec. 18, by which the limitation of six years is extended to "all actions of debt founded upon any contract, obligation or liability not under seal, excepting such as are brought upon the judgment or decree of some court of the United States, or of this or some other state;" to "all actions upon judgments rendered in any court, not being a court of record;" to "all actions of debt for arrearages of rent not reserved by some instrument under seal;" and to "all actions of account, assumpsit or on the case, founded on any contract or liability, express or implied."

The exception as to judgments, is rendered unnecessary by the provision contained in section 70.

The existing law is also changed, by bringing all cases arising on contract, excepting on judgments and on sealed instruments other than for the payment of money, within the limitation of six years.

- 2. An action upon a liability created by statute, other than a penalty or forfeiture.**

This provision is new, and is intended to legalize a distinction, just in itself, and sustained by the weight of authority, upon the construction of the existing statutes, (although somewhat obscured by a discrepancy in the cases,) between a liability in the nature of a contract, created by statute, and a penalty or forfeiture. In order to render the object of this provision more clear, it must be taken in connection with the second subdivision of section 72, which applies the limitation of three years to "actions upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this state,"—with the second subdivision of section

73, which includes within the two years' limitation, "an action upon a statute for a forfeiture or penalty to the people of this state," and with the provision contained in section 76, that "an action upon a statute for a penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action be not commenced within the year, by a private party, it may be commenced within two years thereafter, in behalf of the people of this state, by the attorney general, or the district attorney of the county where the offence was committed."

The sections of the Revised Statutes on this subject are contained in 2 R. S. 3d ed. sec. 29, 30, 31, which provide that, "actions upon a statute for any forfeiture or penalty, to the people of this state, shall be commenced within two years;" (sec. 29;) that "actions upon a statute for a forfeiture or penalty, given in whole or in part to any person who will prosecute for the same, shall be commenced within one year after the offence shall have been committed; and that if it be not commenced within that time, by a private citizen, it shall be commenced within two years after that year ended, in behalf of the people of this state, by the attorney-general, or the district attorney of the county where the offence was committed; (sec. 30;) and that "actions upon a statute for a forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, or to such party and the people of this state, shall be commenced within three years after the offence committed, or the cause of action accrued." (Sec. 31.)

It will be observed, that, in their general character, the proposed provisions are similar to those contained in the Revised Statutes, except that in the provision corresponding to section 31, in the Revised Statutes, the word "penalty" is substituted for the word "cause," so as to make this provision conformable to the others, in which the limitation of actions for penalties and forfeitures is prescribed. The difference in phraseology in the former statutes has given rise to much discussion, and to very contradictory constructions, by the courts, of the

terms used ; which it seems expedient to determine, by a legislative declaration on the subject.

For example, in the case of *Van Hook v. Whitlock*, 7 Paige, 379—381, Chancellor *Walworth* regarded the provision of the Revised Statutes, which applied to actions “for any penalty or cause,” as extending to actions other than for *penalties or forfeitures*; such as actions against the stockholders of a corporation to charge them individually for its debts, upon a dissolution of the company; on the ground, that such actions were founded solely upon a statutory liability. In the same case, in the court of errors, on appeal, (26 *Wend.* 51—53,) Chief Justice *Nelson* discussed the question, and expressed an opposite opinion; deeming that it ought not to be construed as extending beyond fines and penalties or forfeitures. But the point was not decided, the result of the cause having turned upon other questions.

More recently, the supreme court, in *Freeland v. M'Cullough*, 1 Denio, 421—424, agreed with Chancellor *Walworth* in his construction, and held the section applicable to the class of cases referred to by him ; and this case, or one in which a similar principle was held, has, as we are informed, been since reversed by the court of appeals ; thus interpreting the statute according to the views expressed by Chief Justice *Nelson*.

The conflict of opinion, thus existing, seems to render further legislation necessary ; and the question therefore presents itself, which is the proper rule ? We are disposed to recommend it, in accordance with the views of Chief Justice *Nelson*. He deprecates the extension of the three years limitation in the section of the Revised Statutes referred to, beyond actions for penalties and forfeitures, because it would have the effect of presenting “a short bar of three years to every action and cause of action arising out of and founded upon any statutory regulation, such as suits against heirs, executors and administrators, the president and other officers of corporations under the general banking law, besides many others that might be enumerated.” (26 *Wend.* 53.) The distinction between the two classes of cases, is broad and distinct, and it would seem, that the limitation applicable to each should be equally

so. There is good reason for a short limitation to actions on penalties and forfeitures, because they are disfavored in the law ; but no reason seems to exist, why a liability for a debt created by statute, and which in most cases is founded on as strong an equity, as where it results from the direct agreement of the party, should stand upon a different footing from the latter, as respects the period within which it should be enforced.

### 3. An action for trespass upon real property.

The same as 2 R. S., 3d ed., 394, sec. 18, subdiv. 5 ; excepting the substitution of the words " real property," in place of " lands."

### 4. An action for taking, detaining or injuring any goods or chattels, including actions for the specific recovery of personal property.

The same as 2 R. S., 3d ed., 394, sec. 18, subdiv. 6 ; excepting that the words " including actions for the specific recovery of personal property," are substituted in place of " including actions of replevin." This change of phraseology is rendered necessary, by the provision proposing to abolish the existing forms of action.

### 5. An action for criminal conversation, or for any other injury to the person or rights of another, not arising on contract, and not hereinafter enumerated.

The same as 2 R. S., 3d ed., 394, sec. 18, subdiv. 7 ; excepting that actions for libels have been taken out of the six years limitation, and, as will be seen by section 73, transferred to the class which are within the two years limitation. The propriety of this change is confidently submitted to the legislature. Where the action involves, as cases of libel and slander and the like, generally do, mere feeling, rather than a substantial question of right—or, at all events, where a long delay in bringing the action affords pretty certain evidence that

the party has sustained but little injury from the act complained of, there is no reason for allowing it to be brought at a period so long after the accruing of the cause of action.

**6. An action for relief, on the ground of fraud ; the cause of action in such case not to be deemed to have accrued, until the discovery by the aggrieved party, of the facts constituting the fraud.**

The same as 2 R. S., 3d ed., 399, sec. 51 ; except that, to conform it to the uniform course of proceedings in cases, whether of legal or equitable cognizance, as proposed by this act, the word "actions" has been substituted for "bills for relief."

**§ 72. Within three years :**

**1. An action against a sheriff or coroner, upon a liability incurred by the doing of an act in his official capacity, and in virtue of his office, or by the omission of an official duty ; including the non-payment of money collected upon an execution. But this section shall not apply to an action for an escape.**

This provision is intended to embrace the class of cases included in 2 R. S., 3d ed., 394, sec. 22 ; by which "all actions against sheriffs and coroners, upon any liability incurred by them, by the doing any act in their official capacity, or by the omission of any official duty, except for escapes, shall be brought within three years after the cause of action shall have accrued, and not after that period." That provision having been, however, the subject of frequent construction, it is so altered, in the above proposed subdivision, as to contain the rule, not merely as prescribed by the legislature, but as settled by judicial construction. The words, "and by virtue of their office," are introduced in conformity to the construction given to the provision of the Revised Statutes, by the case of *Norris v. Van Voast*, 19 Wend. 284 ; in which it was held not to ap-

ply to an action of trespass, against a sheriff, for an alleged wrongful taking of personal property, which he justified under a writ of replevin. The provision was, for the first time, enacted in the Revised Statutes, and was designed to relieve the sureties of sheriffs, by requiring suits to be speedily brought, where they stood responsible for those officers; (*Revisers' Notes*, 3 R. S. 2d ed. 702;) and in terms, as well as in intent, was held by the supreme court, in the case referred to, to apply only to cases of official liability, such as enabled the party aggrieved to resort to the official bond; or, in other words, to acts done *by virtue*, and not *by color* of office. The same distinction was also sustained in *Ex parte Reed*, 4 Hill, 572, 573.

The words, "including the non-payment of money collected upon an execution," are introduced, in consequence of some doubt as to the existing rule. By the construction given to the section of the Revised Statutes, from which this is taken, in the case of *Elliot v. Cronk's administrators*, 13 Wend. 35, 40, it was held, that an action of that nature, as for money had and received, was one *upon contract or legal liability*, and therefore came within the six years limitation. The effect of this construction would be, to defeat the object of the section, so far as the protection of the sheriff's sureties is concerned; they being clearly liable for such an omission of duty on this part. (*The People v. Ring*, 15 Wend. 623.) In the more recent case, however, of *Shepard v. Hoit*, 7 Hill, 198, 200, an action of that nature, against a sheriff, was regarded as one to which the limitation of three years was applicable.

The provision in the text has, therefore, been proposed with a view to settle the rule, and to make it conformable to the original intention of the legislature, as expounded by the courts.

2. An action upon a statute, for a penalty or forfeiture, where the action is given to the party aggrieved, or to such party and the people of this state, except where the statute imposing it prescribes a different limitation.

This provision is founded upon the section of the Revised Statutes, (2 R. S. 3d ed. 395, sec. 31,) which enacts that "all actions upon any statute made, or to be made, for any forfeiture or cause, the benefit and suit whereof is limited to the party aggrieved, or to such party and the people of this state, shall be commenced within three years after the offence was committed, or the cause of action accrued, and not after."

The alterations of phraseology in the proposed provision, are designed to carry out the distinction between a liability created by statute, and a penalty or forfeiture, as that distinction is explained in the note to section 71, subdivision 2; (p. 99—102;) and with this view, the loose and general language of the Revised Statutes "for any forfeiture or cause," is restricted to penalties and forfeitures alone.

#### § 73. Within two years :

1. An action for libel, slander, assault, battery, or false imprisonment.

This provision differs from those of the Revised Statutes, (2 R. S. 3d ed. 394, sec. 19, 20,) in this, that the latter place actions of assault and battery within the limitation of four years, actions for slander, ( or "for words spoken, slandering the character or title of any person," or "whereby special damages are sustained,") within the limitation of two years, and actions of libel, within that of six years. The remarks in the note to the fifth subdivision of section 71, (p. 102,) are applicable to all these cases, and shew, in our opinion, the propriety of placing them all within the same limitation, and that, not exceeding the time mentioned in this section.

2. An action upon a statute, for a forfeiture or penalty to the people of this state.

Same as 2 R. S. 3d ed. 395, sec. 29.

#### § 74. Within one year :

1. An action against a sheriff or other officer, for the escape of a prisoner arrested or imprisoned on civil process.

This section is the same as 2 R. S. 3d ed. 394, sec. 21; excepting that the words "arrested or" are introduced in conformity with the construction given to a similar provision, in 1 R. L. of 1813, p. 427, sec. 28; where the word "imprisoned," alone was used. In a case which arose under that statute, it was contended, that the term "imprisoned" did not apply to the escape of a person *arrested*, merely, before his commitment to prison; but the supreme court held otherwise. (*Roe v. Beakes*, 7 Wend. 459.)

§ 75. In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item in the account, on the adverse side.

This section is founded upon the following provision of the Revised Statutes:—"In all actions of debt, account or assumpsit brought to recover any balance due upon a mutual, open and current account, the cause of action shall be deemed to have accrued from the time of the last item proved in such account." (2 R. S. 3d ed. 394, sec. 23.)

While the proposed provision is not intended to alter, in substance, the section just cited, it contains several variations in phraseology, which it is proper to notice.

*First.* It omits the forms of actions referred to in that section.

*Second.* It introduces the words "where there have been reciprocal demands between the parties,"—with a view to obviate the obscurity, in which the existing statute has been involved, by loose expressions on the part of the courts, and to conform

it to what is undoubtedly its true construction. In the case of *Kimball v. Brown*, 7 Wend. 322, it was contended that, under the terms "mutual, open and current account," one item of an account within six years before suit brought, drew after it items beyond six years, so as to protect the latter from the operation of the statute. But the court held that it did not, and that there must have been *mutual accounts* and *reciprocal demands* between the parties. Some doubt, however, was thrown upon this construction, by the very loosely considered opinion of the supreme court, in *Chamberlin v. Cuyler*, 9 Wend. 126, where an item in an account within six years, was held to take items beyond six years out of the statute. In that case, the defendant was sued in 1829, on a demand accruing in 1826; and he proved an account against the plaintiff, by way of set off, consisting of items, some of which accrued in 1826, others in 1822, and others in 1818. Upon this state of facts, the court decided that the items accruing in 1826, drew after them the previous charges, and saved them from the operation of the statute; and regarded the rule as being,—“that if there is a lapse of six years between the items, it shall cease, as to such charges, to be considered an open account; but where, from the commencement to the termination of the account, charges have been made at least as often as once in six years, and the last item is within six years anterior to the commencement of the suit, the whole account is to be allowed.” And this construction, which is in obvious violation of the principle on which the provision in question was founded, has been more recently attempted to be explained, but is in fact, overruled, in *Edmondstone v. Thomson*, 15 Wend. 554; and the true sense of the statute is there re-asserted; namely, that it referred to *mutual, open and reciprocal* accounts. To put an end, if possible, to all doubt on the subject, the most explicit language is used in the section proposed.

*Third.* The words “on the adverse side,” in the last line, have been introduced, in connection with the item accruing within six years, to meet what is supposed to be the meaning of the statute. It is true, that in one case, the supreme court held, that if there were mutual accounts current, and any one item, on either side, were proved to have arisen with

years next before the suit brought, this would draw after it both accounts, and take the case out of the statute of limitations. (*Sickles v. Mather*, 20 *Wend.*, 74.) The case does not seem to have been very fully considered, on this point; and, with becoming deference to the authority of the court by which it was decided, the decision does not seem to be sustained, either by the principle on which the statute is founded, or by the sense of the previous cases. The object of the statute, as construed by the courts, in the cases already cited, was to require that the accounts should be *reciprocal*, in order to found a presumption in favor of items beyond six years. It cannot reasonably be said, that items *on the same side* of the account within six years, should carry with them items of a previous date. It is the last item *on the adverse side*, which alone, according to sound justice and the fair construction of the existing statute, should be regarded as evidence of an admission that the account is open and unpaid; and to put an end to all doubt on the subject, it is deemed advisable, expressly to provide that such shall be the rule.

§ 76. An action upon a statute for a penalty or forfeiture, given in whole or in part to any person who will prosecute for the same, must be commenced within one year after the commission of the offence; and if the action be not commenced within the year, by a private party, it may be commenced within two years thereafter, in behalf of the people of this state, by the attorney-general, or the district attorney of the county where the offence was committed.

Same as 2 R. S., 3d ed., 395, sec. 30.

§ 77. An action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued.

This section is a substitute for the article of the Revised Statutes, "of the time of commencing suits in courts of equity," (2 R. S., 3d ed., 398, 399,) and provides for all the cases

heretofore known as suits in equity, excepting for relief on the ground of fraud ; which case has been already provided for, in the sixth subdivision of section 71. In that case, as well as in those embraced in this section, the periods of limitation are the same as those now existing ; the only difference being, that by the present statutes, they are applied to the form, while by the proposed section they are made to depend upon the substance of the remedy. This will be more apparent, from an examination of the provisions of the existing statutes, which are as follows :

“ Whenever there is a concurrent jurisdiction in the courts of common law, and in courts of equity, of any cause of action, the provisions of this title, limiting a time for the commencement of a suit for such cause of action, in a court of common law, shall apply to all suits hereafter to be brought for the same cause, in the court of chancery.” (2 R. S., 3d ed., 398, sec. 49.)

“ But the last section shall not extend to suits, over the subject matter of which a court of equity has peculiar and exclusive jurisdiction, and which subject matter is not cognizable in the courts of common law.” (*Ibid.*, sec. 50.)

“ Bills for relief, on the ground of fraud, shall be filed within six years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not after that time.” (2 R. S., 3d ed., 399, sec. 51. )

“ Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after.” (*Ibid.*, sec. 52.)

§ 78. The limitations prescribed in this title shall apply to actions brought in the name of the people of this state or for their benefit, in the same manner as to actions by private parties.

Same as 2 R. S., 3d ed., 395, sec. 28.

## CHAPTER IV.

### GENERAL PROVISIONS AS TO THE TIME OF COMMENCING ACTIONS.

SECTION 79. When action deemed to have been commenced.

80. Exception, where defendant is out of the state.
81. Exception, as to persons under disabilities.
82. Provision where person entitled, dies before the limitation expires.
83. In suits by aliens, time of war to be deducted.
84. Provision, where judgment has been reversed.
85. Time of stay of action by injunction to be deducted.
86. Disability must exist when right of action accrued.
87. Where two or more disabilities, limitation does not attach, till all removed.
88. This title not applicable to bills, &c., of corporations, or to bank notes.
89. Nor to actions against directors or stockholders of monied corporations.  
Limitation, in such cases, prescribed.
90. New promise must be in writing.

§ 79. An action shall not be deemed commenced, within the meaning of this title, unless it appear :

1. That the summons or other process therein was duly served upon the defendants, or one of them ; or

2. That the summons was delivered, with the intent that it should be actually served, to the sheriff of the county in which the defendants, or one of them, usually or last resided ; or if a corporation be defendant, to the sheriff of the county in which such corporation was established by law, or where its general business was transacted, or where it kept an office for the transaction of business.

This section is the same in principle, as the provision of the Revised Statutes, which enacts as follows :

“ No action for the recovery of any debt, demand or damages only, or for the recovery of any penalty or forfeiture, shall be deemed to have been commenced within the meaning of this chapter, unless it appear, 1. That the first process or

proceeding therein was duly served upon the defendants, or some or one of them : or, 2. That a *capias ad respondendum* was issued within the time required by law, to the sheriff of the county in which the defendants, or some or one of them usually resided, or last resided, in good faith and with intent to be actually served ; and that such writ was duly returned : 3. If a corporation be defendant, that the first process was in like manner issued to the sheriff of the county in which such corporation was located by law, or in which the place of transacting its business was situated, with the intent to be actually served ; and that such process was duly returned. (2 R. S., 3d ed., 397, sec 38.)

The proposed section differs in this, that it extends the rule to all actions, and is based upon the uniform mode of commencing them provided by section 106.

It is proper here to remark, that immediately following the provision of the Revised Statutes, just quoted, there were two sections designed to give it more complete effect, and which are as follows:

“ When a suit shall be alleged by a plaintiff to have been commenced within the time required by law, and such allegation shall be put in issue by the defendant, it shall be competent for the defendant to prove, on the trial, that the process issued by the plaintiff was not issued with the intent, and in the manner required by law; or that it was issued to the sheriff of one county, when the plaintiff knew, or had reason to believe, that the defendant was in another county and could have been arrested; or that any means whatever were used by the plaintiff, or his attorney, to prevent the service of the writ, or to keep the defendant in ignorance of the issuing thereof.” (2 R. S. 3d ed. 397, sec. 39.)

“ Upon any such matter being established, or upon its appearing in any other way that any process was issued without any intent that it should be served, such service shall not be deemed the commencement of a suit, within the meaning of any of the provisions of this chapter.” (Ibid. sec. 40.)

It appears to us, that the matters aimed at by these enactments, so plainly result from the provision contained in the proposed section, as well as from that of the Revised Statutes, upon which it is founded, as to render their insertion unnecessary. If the suit must be commenced in good faith, as expressly prescribed, it is certainly needless to provide, that, when the question arises, (as it can alone arise,) on the trial, the fact of the action being so commenced must be proved by the plaintiff, or that it may be controverted by the defendant. We have omitted them, because of our earnest desire, not merely to provide as simple a system of remedies, as possible, but to disembarass the subject of all unnecessary detail.

§ 80. If, when the cause of action shall accrue, against a person, he be out of the state, the action may be commenced within the term herein limited, after his return to the state; and if, after the cause of action shall have accrued, he depart from and reside out of the state, the time of his absence shall not be part of the time limited for the commencement of the action.

Same as 2 R. S. 3d ed. 395, sec. 27.

§ 81. If a person entitled to bring an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either :

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution under the sentence of a criminal court, for a term less than his natural life; or
4. A married woman :

**The time of such disability shall not be part of the time limited for the commencement of the action.**

Same as 2 R. S. 3d ed. 394, sec. 24.

**§ 82. If a person entitled to bring an action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, his representatives may commence the action, after the expiration of that time, and within one year from his death.**

**§ 83. When a person shall be an alien subject or citizen of a country at war with the United States, the time of the continuance of the war shall not be part of the period limited for the commencement of the action.**

The last two sections are the same as 2 R. S. 3d ed. 395, sec. 26; 396, sec. 32; excepting that they apply to all actions, instead of being confined, as in the corresponding provisions of the Revised Statutes, to actions relating to real property, or for the recovery of a debt or demand, or for damages only.

**§ 84. If an action shall be commenced within the time prescribed therefor, and a judgment therein for the plaintiff be reversed, on appeal, the plaintiff, or if he die and the cause of action survive, his heirs or representatives may commence a new action within one year after the reversal.**

Same as 2 R. S. 3d ed. 396, sec. 33; except that it provides for the case of a reversal of a judgment only, and not for the case of an arrest of judgment, as in the corresponding provision of the Revised Statutes. The reason of this difference is, that with a view to compel the defendant to avail himself of any objection he may have to the plaintiff's recovery,

arising upon the face of the complaint, it is proposed by section 127, p. 149, to treat his omission to demur or answer as a waiver of the objection, except where it is to the jurisdiction of the court over the subject of the action.

§ 85. When the commencement of an action shall be stayed by injunction, the time of the continuance of the injunction shall not be part of the time limited for the commencement of the action.

Same as 2 R. S. 3d ed. 396, sec. 36.

§ 86. No person shall avail himself of a disability, unless it existed when his right of action accrued.

Same as 2 R. S. 3d ed. 397, sec. 41.

§ 87. When two or more disabilities shall exist, the limitation shall not attach until they all be removed.

Same as 2 R. S. 3d ed. 397, sec. 42.

§ 88. This title shall not affect actions to enforce the payment of bills, notes or other evidences of debt issued by monied corporations, or issued or put in circulation as money.

This section is founded on 2 R. S. 3d ed. 395, sec. 25; by which it is provided that none of the provisions of the article, "of the time of commencing actions for the recovery of any debt or demand, or for damages only," "shall apply to suits brought to enforce payment on bills, notes or other evidences of debt issued by monied corporations." It differs in this, that the prohibition is made to extend, in terms, to "bills or notes issued or put in circulation as money," and in this respect, it uses the language by which securities of that nature are described in article 8, section 6, of the constitution.

§ 89. This title shall not affect actions against directors or stockholders of a monied corporation, to recover a penalty or forfeiture imposed, or to enforce a liability created, by the second title of the chapter of the Revised Statutes, entitled "Of incorporations;" but such actions must be brought within six years after the discovery, by the aggrieved party, of the facts upon which the penalty or forfeiture attached, or the liability was created.

Same as 2 R. S., 3d ed., 397, sec. 44.

§ 90. Where the time for commencing an action arising on contract shall have expired, the cause of action shall not be deemed revived by an acknowledgment or new promise, unless the same be in writing, subscribed by the party to be charged thereby.

This section has been well considered, and is presented as embodying a principle which seems to us necessary, if any substantial effect whatever is to be given to the statute of limitations. As the law now stands in this state, a verbal acknowledgment of the existence of a debt which is barred by the lapse of time, or a verbal admission by which a subsisting demand is recognized, is deemed sufficient to revive the cause of action.

If the policy of the statute of limitations, as regarded by the most enlightened courts and legislators of modern times, be sound, it is difficult to perceive upon what principle its operation should be allowed to be defeated, by the kind of evidence by which it is now invariably overcome. All that is required for this purpose, is the proof of a verbal admission or acknowledgment of a subsisting indebtedness. And upon almost any proof, tending to establish this fact, it is the habit of courts and juries to facilitate a recovery. Nay, more,—a rule has been allowed to spring up, by which a sort of judicial denial of the right of a party to avail himself of the benefits of the statute has

been established. We allude to the doctrine of odious or inequitable defences—under which, the courts have undertaken to say, that when an indulgence or favor is applied for, it will not be granted, unless upon the condition that a plea of the statute of limitations be not interposed.

In such a doctrine, we confess we can see no sound principle of justice. Independently of the answer, which to our minds is a conclusive one, that every defence which has the sanction of law, is a defence which the courts are bound, if not to encourage, at least not to discourage, we see no reason why this particular one should be viewed with disfavor. The force of the remarks of Mr. Justice *Story*, on the subject, before quoted, (p. 98) is too obvious to require a defence; but if any were necessary, a more conclusive answer to the objections with which this statute has had to contend, cannot be furnished, than is to be found in the remarks of one of the most fearless and enlightened reformers, who has adorned any age, (Lord *Brougham*,) in his memorable speech on Law Reform. In referring to the prejudice with which this statute had been assailed by the judiciary, he remarks:—"But even in cases where we have a statute of limitation, there is hardly any vestige left of the relief which it was intended to afford, owing to the labors of the courts in finding means of evading its beneficial operation. It was plainly meant as an act of peace and quiet. My noble friend, (Lord *Plunkett*,) who presides in the court of common pleas of the sister kingdom, once said, with his usual felicity of expression, that time is armed with his scythe to destroy the evidences on which titles rest, but the lawgiver makes him move with healing on his wings to stay the ravages of his weapon. To thwart the designs of the legislature, the courts have been setting up their rules of presumption. At one time they seemed really to hold that any thing, even the simplest expression, would take a debt out of the statute of limitations; for instance, if a defendant had said—"I have paid the debt," he was taken as admitting it, unless he could prove payment. Again, if he said, 'I owe you nothing,' the assertion was taken as an acknowledgment; and he was also required to prove an acquittance of the plaintiff's claim. The reply—"Six years have ex-

pired,' was equally dangerous, though it was only saying out of court, what the statute itself allowed him to say in pleading. In fact, so deeply did Lord *Erskine* feel the difficulties which encompassed the defendant under these efforts of judicial acuteness, that he said the only safe course a defendant could take, when his adversary sent a fishing witness, was to knock him down; for though he might be proceeded against for the assault, he retained the benefit of the statute as regarded the debt. Although of late, the current of decisions (as it is pleasantly termed,) has set in more in an opposite direction, there is still abundant room for a provision to give this wholesome law effect. The means are obvious. Let nothing but an acknowledgment in writing take any debt out of the statute. In a word, prop the main pillar of security against stale, and unjust demands,—the statute of limitations,—by a beam from that other bulwark against perjury, the statute of frauds."

The general views which are here so forcibly expressed, in respect to the object and design of this statute, have been adopted in the courts of this country, and especially in those of this state. In the first case in this state, in which that ground was distinctly assumed by the supreme court, (*Purdy v. Austin*, 3 Wend. 189,) it is said—"This statute has been looked upon in times past, with disfavor, by the courts in England, and their example has been too generally followed by the courts in this country. Construction formerly went far, towards depriving defendants of the benefit designed for them by it. A different and better view of this salutary statute, has since been taken, and a more correct and liberal construction is now given to it. Defences under it are not now regarded, as they once were, as discreditable, or at least are not so viewed to the same extent as formerly. It is assuming, as it was intended it should have had, the character of a 'statute of repose.' If the more recent decisions, in relation to the effect of acknowledgments, are to be sustained, defendants may speak of dormant claims preferred against them, without necessarily losing the benefit of this law." These principles are now the governing ones, in

this state, and have ever since been enforced, by a number of adjudged cases, where this defence has been interposed.

But we are still far behind the legislation of England, in giving effect to these defences, and in protecting the rights of a defendant from the dangers to which he yet stands exposed. The policy of the statute of frauds, which is invoked by Lord *Brougham*, in aid of the statute of limitations, is, that no one should be subjected to the hazard of the testimony of a witness in a matter resting merely in contract, but that written evidence or something of at least equal intrinsic force should be adduced, as the foundation of a liability. It is a policy as wise in the abstract, as it is sound and just in its application. The observation of every man of intelligence will attest the fact, that of all species of evidence, none is more dangerous, and none more calculated to lead to irremediable perjury, than that which relates to the admissions of a party. And if to this we add the unthinking prejudice, which, in the minds of many, attaches itself to the defence of the statute of limitations—a prejudice to which it is to be regretted, the courts have at times, given too decided a sanction—it will scarcely be matter of surprise, that an act, designed to protect from fraud, should have been permitted to become the passive instrument, at least, of injustice.

One of the most eminent jurists of our country, (Mr. *Greenleaf*), in his treatise upon the law of evidence, (*Greenl. Ev.* 233,) remarks:

“With respect to *all verbal admissions*, it may be observed, that they ought to be *received with great caution*. The evidence, consisting as it does in the mere repetition of oral statements, is subject to much imperfection and mistake; the party himself either being misinformed, or not having clearly expressed his own meaning, or the witness having misunderstood him. It frequently happens, also, that the witness, by unintentionally altering a few of the expressions really used, gives an effect to the statement, completely at variance with what the party did actually say.”

To the same effect, also, Mr. Justice *Sutherland*, in *Malin v. Malin*, 1 Wend. 652, remarks:

“It has been often said, both by judges and elementary writers, that proof of the declarations or confessions of parties, is the most unsatisfactory species of evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it, and because the slightest mistake or failure of recollection may totally alter the effect of the declaration.”

And Chancellor *Walworth*, in speaking of the same subject, observes, in *Law v. Merri's*, 6 Wend. 277:

“Evidence to establish a fact by the confessions of the party should always be scrutinized, and received with caution; as it is the most dangerous evidence that can be admitted in a court of justice, and the most liable to abuse. Although a witness is perfectly honest, *it is impossible*, in most cases, for him to give the exact words in which an admission was made. And sometimes even the transposition of the words of a party, may give a meaning entirely different to that which was intended to be conveyed to the witness.”

The application of these principles to the rights secured by the statute of limitations, is the object of the section under consideration. Independently, however, of the intrinsic justice of a provision, such as we have proposed, it will come recommended by no ordinary weight of authority, when it is remembered that as long ago as the ninth year of George IV., it was adopted by the British parliament upon the recommendation of Lord *Tenterden*, then Lord Chief Justice of the Court of King's Bench, and that it has in that country been ever since deemed one of the wisest reforms in modern legislation. (9 *Geo. IV.*, ch. 14.)

The act referred to is entitled “an act for rendering a written memorandum necessary to the validity of certain promises and engagements.” The first section (which is the only one relating to this subject,) is as follows:

“Whereas, by an act passed in England in the twenty-first year of the reign of King James the First, it was, among other things enacted, that all actions of account and upon the case, other than such accounts as concerned the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract, without specialty, and all actions of debt for arrearages of rent, should be commenced within three years after the end of the then present session of parliament, or within six years next after the cause of such actions or suits, and not after; and whereas a similar enactment is contained in an act passed in *Ireland* in the tenth year of the reign of King Charles the First; and whereas, various questions have arisen, in actions founded upon simple contract, as to the proof and effect of acknowledgments and promises, offered in evidence for the purpose of taking cases out of the operation of the said enactments, and it is expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof; Be it therefore enacted, by the King's Most Excellent Majesty, and by and with the consent of the Lords spiritual and temporal, and commons, in this parliament assembled, and by the authority of the same, that in actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise by word only shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them; provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever; provided also, that in actions to be

commenced against two or more such joint contractors or executors or administrators, if it shall appear at the trial, or otherwise, that the plaintiff though barred by either of the said recited acts or this act, as to one or more of such joint contractors or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff, as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

It will be observed, that in the section proposed, we have retained the substance of the English act, though we have endeavored to condense its phraseology, without altering its spirit.

Before passing from this chapter, it is proposed to call the attention of the legislature to some provisions in the corresponding article of the Revised Statutes, which we have deemed it right to omit ; and which are, therefore, brought within the repeal, contained in section 66. They consist of three sections ; the first two of which provide as follows :

"If any action shall have been commenced within the times respectively prescribed in the three first articles of this title, and the defendant in such suit die before judgment ; and if the right of action be such as survives against the representatives of the defendant, the plaintiff may commence a new action against the heirs, executors, or administrators of such defendant, as the case may require, within one year after such death ; or if no executors or administrators be appointed within that time, then within one year after letters testamentary, or of administration, shall have been granted to them." (2 R. S. 3d ed. 396, sec. 34.)

"When an action commenced within the time prescribed by law, shall abate by reason of the death of the plaintiff, if the right of action survive to his representatives, his executor or administrator may, within one year after such death, commence a new action, if the cause of action would otherwise

survive ; and if any action so commenced by an executor or administrator, shall abate by the death of the plaintiff, a new action may be commenced by the administrator of the same estate, at any time within one year after such abatement." (*Ibid.* sec 35.)

As a substitute for these, and other statutory provisions, and for the practice generally, in reference to abatement of actions by the death of parties, it is proposed by section 101, (p. 127,) to authorize the court on motion, to continue the original suit, where the cause of action survives.

The last provision of the Revised Statutes, above referred to as omitted, enacts that, "whenever the commencement of any suit shall be prevented by reason of any privilege of any member of either house of the legislature of this state, or of any member of either house of the congress of the United States, the time during which the same shall have been so prevented, shall not be deemed any portion of the time limited for the commencement of any suit for the recovery of any debt, demand, or damages only." (2 R. S. 3d ed. 397, sec. 37.)

When this provision was first introduced into the statutes of this state, there was no other mode of commencing, what is now known as a personal action, than by a writ of *capias ad respondendum*. Upon this writ, the defendant was liable, in nearly all cases, to be arrested and held to bail ; and in most cases, this could be done without a judicial order, at the mere caprice of the plaintiff. It was very proper, therefore, while this practice continued, to protect members of congress and of the state legislature, from a proceeding, injurious alike to themselves, and to the interests of their constituents. But, under a system which proposes, as this does, that every action shall be commenced by a summons, the right of privilege from arrest has nothing to do with the right to commence the action, and cannot, of course, enter into the question of limitation. The privilege of the persons here described, from arrest on the process provided for that purpose by this act, is in no degree impaired by the omission of the existing provision.

## TITLE III.

### Of the Parties to Civil Actions.

- SECTION 91.** Action to be in the name of the real party in interest.  
92. Assignment of a thing in action not to prejudice a defence.  
93. Executor or trustee may sue without the persons beneficially interested.  
94. When married woman is party, her husband to be joined, except, &c.  
95. Infant to appear by guardian.  
96. Guardian how appointed.  
97. Who may be joined as plaintiffs.  
98. Who may be joined as defendants.  
99. Parties united in interest to stand on the same side, except, &c.  
100. Plaintiff may sue in one action the different parties to commercial paper.  
101. Action not to abate by death, marriage, or other disability, &c.  
102. Court may require all persons to be made parties who may be necessary to a complete determination of the controversy.

The rules respecting parties in the courts of law, differ from those in the courts of equity. The blending of the jurisdictions makes it necessary to revise these rules, to some extent. In doing so, we have had a three-fold purpose in view : first, to do away with the artificial distinctions existing in the courts of law, and to require the real party in interest to appear in court as such: second, to require the presence of such parties as are necessary to make an end of the controversy: and third, to allow otherwise great latitude in respect to the number of parties who may be brought in.

The common law prohibited the assignment of a thing in action. It did so for an artificial reason, which is not applicable to our circumstances. The courts of equity, on the other hand, allowed and protected the assignment. The consequence was, that the assignee could bring a suit in equity upon the demand assigned, while the law looked upon him as having no rights in regard to it, and forbade his appearance in its courts.

Finally, with the increase of commerce, and the spread of more liberal opinions, the common law courts began to look upon the assignee with some forbearance, and winked at the assignment, so far as to deny the right of the assignor to release the debt; but they still refused to recognize the right of the assignee to sue. So this is the condition of the parties; if the assignee sues at law, he is turned out of court, and if the assignor sues in equity, he is turned out also. If at this moment, any member of the legislature, to whom a bond and mortgage had been assigned, were to go into the supreme court and sue upon the bond, he would have to sue in the name of the person who made the assignment, however much distrusted, or lose his case; but if he were to sue on the mortgage, for the foreclosure, he would have to sue in his own name, or he would not be heard. And yet it is the same judge who sits in the two cases.

The true rule undoubtedly is, that which prevails in the courts of equity, that he who has the right, is the person to pursue the remedy. We have adopted that rule. It will be found in the form in which we have stated it, in *Field v. Maghee*, 5 Paige, 539. *Rogers v. Traders' Ins. Co.*, 6 Paiges, 598; and *Miles v. Hoag*, 7 Paige, 21.

The courts of law generally administer justice between those parties only who stand in the same relation to each other; while courts of equity bring before them various parties, standing in different relations, that the whole controversy may be settled, if possible, in one suit, and others avoided. This reasonable and just rule, we would adopt for all actions. It is for the interest neither of the suitor nor of the state, that there should be several suits to settle one controversy, so long as one will do it as well. We have had no hesitation in providing therefore, as we have done by section 102, that when a complete determination of the controversy cannot be had without the presence of parties not at first brought before the court, the court may direct them to be made parties.

Having prescribed these rules, we have intended to leave litigants very much at liberty to choose whom to make defend-

ants, and whom to join as plaintiffs. No person can be affected by a judgment, but a party, or one who claims under him. This rule will make the plaintiff bring in all the parties whom he wishes to affect. The judgment, as we have provided by section 161, can be given for or against any one or more of the plaintiffs or defendants. This will save the plaintiff from the hazard now encountered in bringing in too many parties, except that of paying costs.

Upon the whole we venture to express our belief, that we have given rules on the subject of parties, which will remove many evils now existing, and which will be found neither too stringent for suitors, nor too loose for the purposes of substantial justice.

§ 91. Every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 93.

§ 92. In the case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defence existing at the time of or before notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange.

which one party to a contract may have against the other, though an assignment be made. It is conformable in spirit to the act passed in 1835, (*Laws of 1835, ch. 197*,) providing for a suit by the assignee, in case of the death of the assignor.

§ 93. An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the persons for whose benefit the suit is prosecuted.

§ 94. When a married woman is a party, her husband must be joined with her except that, -

1. When the action concerns her separate property, she may sue alone :

2. When the action is between herself and her husband, she may sue or be sued alone.

§ 95. When an infant is a party, he must appear by guardian, who may be appointed by the court in which the action is prosecuted, or by a judge thereof.

§ 96. The guardian shall be appointed as follows :

1. When the infant is plaintiff, upon the petition of the infant, if he be of the age of fourteen years, or if under that age upon the petition of some other party to the suit, or of a relative or friend of the infant :

2. When the infant is defendant, upon the petition of the infant, if he be of the age of fourteen years, and apply within twenty days after the service of the summons. If he be under the age of fourteen, or neglect so to apply, then, upon the petition of any other party to the action, or of a relative or friend of the infant.

§ 97. All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs, except as otherwise provided in this title.

This will enable a surviving partner and the representative of a deceased partner, to sue together, whenever desirable.

§ 98. Any person may be made a party defendant, who has an interest in the controversy, adverse to the plaintiff.

This will enable a plaintiff to exhaust in, one suit, his remedies against a surviving partner, and the representative of a

deceased partner. Many other cases to which it applies, will readily suggest themselves.

§ 99. Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one, who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint.

Conformable to rule, prescribed by the supreme court, U. S., for suits in equity.

§ 100. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may, all or any of them, be included in the same action, at the option of the plaintiff.

Conformable to the present statute authorizing suits against the different parties to bills of exchange and promissory notes. *Laws of 1832, Chap. 276.*

§ 101. No action shall abate by the death, marriage or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue. In case of death, marriage, or other disability of a party, the court, on motion, at any time within one year thereafter, may allow the action to be continued by or against his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party; or the court may allow the person to whom the transfer is made to be substituted in the action.

This will save the necessity of a new or supplemental action. A statute of similar import in respect to the abate-

ment of actions in the courts of the United States, by death, has existed since 1789.

§ 102. When a complete determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in, by an amendment of the complaint, or by a supplemental complaint, and a new summons

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## TITLE IV.

### Of the place of trial of Civil Actions.

SECTION 103. Certain actions to be tried where the subject arose or is situated.

104. Other actions, where any party resides.

105. Actions may be tried in any county unless defendant objects.

The law of 1847, changed in some respects the pre-existing law as to the place of trial, and of venue, as the distinction has since been drawn by the courts. In the class of actions usually denominated transitory, it requires the trial to be had in a county where the parties or some of them reside; but where the *plaintiffs* are not resident in the state, it follows the Revised Statutes, and permits the trial to be had in the county where the venue shall be laid. The subsequent part of the section of that act, (sec. 46,) makes provision for the case where the venue is not laid as required by the section, whereas the section nowhere requires the venue to be laid in any particular county. Some error has manifestly occurred which deprives the latter part of the section of the effect it was intended to have. We have retained substantially the provisions intended by that act, and have further provided, that an action may be tried, wherever the plaintiff shall designate the place of trial in his complaint, unless the defendant shall, before the time for answering expires demand that it be tried in the proper county, as required by the first two sections of the chapter.

This will enable the trial to be had in New-York, for lands in Buffalo, where both parties desire it. We see no good reason for imposing a restraint upon the convenience of the parties in this respect. The plaintiff and defendant might both reside in New-York, or their witnesses might reside there, or other causes might exist, to make that city the most convenient place of trial for all concerned.

§ 103. Actions for the following causes, must be tried in the county where the cause or some part thereof arose, or in which the subject of the action or some part thereof is situated, subject to the power of the court to change the place of trial in the cases provided by statute :

1. For the recovery of real property or of an estate or interest therein, or for the determination, in any form, of such right or interest, and for injuries to real property :

2. For the partition of real property :

3. For the foreclosure of a mortgage of real property :

4. For the recovery of personal property, distrained for any cause :

5. For injuries to the person or personal property :

6. For the recovery of a penalty or forfeiture imposed by statute ; except, that when it is imposed for an offence committed on a lake, river, or other stream of water, situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offence was committed :

7. Against a public officer or person specially appointed to execute his duties, for an act done by him in virtue of his office, or against a person, who by his com-

mand or in his aid, shall do any thing touching the duties of such officer.

§ 104. In all other cases, the action shall be tried in the county in which the parties or any of them shall reside at the commencement of the action; or if none of the parties shall reside in the state, the same may be tried in any county which the plaintiff shall designate in his complaint; subject, however, to the power of the court to change the place of trial, in the cases provided by statute.

§ 105. If the county designated for that purpose in the complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant shall, before the time for answering expire, demand in writing that the trial be had in the proper county.

## TITLE V.

### **Of the manner of commencing Civil Actions.**

#### **SECTION 106. Actions, how commenced.**

- 107. Summons, requisites of.
- 108. Notice to be inserted in certain actions.
- 109. Complaint to be served with summons, except where no personal claim is made, in which case notice to be given.
- 110. Defendant on whom such notice is served, unreasonably defending, to pay costs.
- 111. Notice of pendency of actions affecting title to real property.
- 112. Summons, by whom served.
- 113. Summons, how served and returned.
- 114. When defendant not found, publication made.
- 115. Several defendants, and part only served, how to proceed.
- 116. When service deemed made in such case.
- 117. Service how proved.

### **§ 106. Civil actions in the courts of record of this State, shall be commenced by the service of a summons.**

In this title we have provided a mode, simple and uniform, for commencing all civil actions. At present, as is well known, there are three modes of commencing a suit at law; by a *capias* against natural persons; a summons against corporations, and a declaration against either, none of them indicating to the defendant plainly what he is charged with, or what he is expected to do. In equity, the suit is commenced by bill and subpoena. We have substituted a summons and complaint in all cases; the service of the summons to be deemed the commencement of the suit, and to be accompanied by a copy of the complaint, except where, in the case of a defendant made a party for having a lien on the property which is the subject of the suit, no claim is made against him personally, and then a notice of the object of the suit is to suffice. The complaint will inform the defendant of the nature and par-

ticulars of the demand, and the form of the summons is such as to indicate to the defendant precisely what he is required to do.

§ 107. The summons shall be subscribed by the plaintiff, or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state, to be therein specified, in which there is a post office, within twenty days after the service of the summons, exclusive of the day of service.

108. The plaintiff shall also insert in the summons a notice, in substance as follows:

1. In an action arising on contract, for the recovery of money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint:

2. In other actions, that if the defendant fail to answer the complaint, the plaintiff will apply to the court, at a specified time and place, (after the expiration of the time for answering,) for the relief demanded in the complaint.

§ 109. A copy of the complaint shall be served with the summons, except, that in the case of a defendant against whom no personal claim is made, in an action for the partition of real property, or for the foreclosure of a mortgage, the plaintiff may, instead of a copy of the complaint, deliver to such defendant, with the summons,

a notice subscribed by the plaintiff, or his attorney, setting forth the general object of the action, a brief description of the property affected by it, and that no personal claim is made against such defendant; in which case no copy of the complaint need be served on such defendant, unless, within the time for answering, he shall, in writing, demand the same.

Similar to the rule now existing in equity, in relation to mortgage cases.

§ 110. If a defendant, on whom such notice is served, unreasonably defend the action, he shall pay costs to the plaintiff.

§ 111. In an action affecting the title to real property, the plaintiff, at any time after the commencement thereof, may file with the clerk of each county in which the property is situated, a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the property in that county affected thereby; and if the action be for the foreclosure of a mortgage, the date of the mortgage, the parties thereto, and the time and place of recording the same. In such case only, shall the pendency of the action be constructive notice to a purchaser or incumbrancer of the property affected thereby.

Conformable to 2 R. S. 174, sec. 43.

§ 112. The summons may be served by the sheriff of the county, where the defendant may be found, or by any other person, not a party to the action. The service

shall be made, and the summons returned, with proof of the service, to the person whose name is subscribed thereto, with all reasonable diligence. The person subscribing the summons, may, at his option, by an endorsement on the summons, fix a time, for the service thereof, and the service shall then be made accordingly.

§ 113. The summons shall be served by delivering a copy thereof, as follows :

1. If the suit be against a corporation, to the president, or other head of the corporation, secretary, cashier, or managing agent thereof :

2. If against a minor, under the age of fourteen years, to such minor personally, and also to his father, mother, or guardian, or if there be none within the state, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed :

3. If against a person judicially declared to be of unsound mind, or incapable of conducting his own affairs, in consequence of habitual drunkenness, and for whom a committee has been appointed, to such committee, and to the defendant personally :

4. In all other cases, to the defendant personally.

§ 114. When the person on whom the service is to be made cannot, after due diligence, be found within the state, and that fact shall appear by affidavit to the satisfaction of the court or a judge thereof, and it shall in *like manner appear that a cause of action exists against the defendant, in respect to whom the service is to be*

summons in two newspapers, which the judge may designate, as most likely to give notice to the defendant, and for such length of time, not less than thirty days, as the judge shall deem reasonable. In case of publication, the judge shall also direct a copy of the summons to be forthwith deposited in the post office, directed to the defendant, at his place of residence, unless it appear to the judge that such residence is neither known to the party making the application, nor can with reasonable diligence be ascertained by him. Personal service of the summons on the defendant, out of the state, shall be equivalent to publication, and deposit in the post office.

The provision contained in this section, is, as we think, not only right in itself, but necessary, in consequence of the blending of legal and equitable jurisdictions. In suits at common law, personal service has been heretofore required, while in suits in equity, an advertisement has been allowed against absent defendants, when personal service could not be made. Uniformity in this respect is now necessary. We see no reason, why the rule prevailing in equitable cases, should not be extended to all. Such a rule prevails in several of the states.

§ 115. Where the action is against several defendants, any one of whom is actually served with the summons, the plaintiff, instead of service of the summons, actually or by publication, on the others, as provided by sections 113 and 114, may proceed as follows :

1. If the action be against several persons, jointly indebted upon a contract, he may proceed against the defendant served, in the same manner, as at present, and with the like effect, unless the court shall otherwise direct :

2. In an action against defendants severally liable, he may amend his complaint, of course, by striking out the name of the other defendants, and may proceed against the defendants served.

§ 116. In the cases mentioned in section 114, the service of the summons shall be deemed complete, at the expiration of the time prescribed by the order for publication.

§ 117. Proof of the service of the summons, and of the complaint or notice, if any, accompanying the same, shall be as follows :

1. If served by the sheriff, his certificate thereof; or

2. If by any other person, his affidavit thereof; or

3 In case of publication, the affidavit of the printer, or his foreman, or principal clerk, shewing the same; and an affidavit of a deposit of a copy of the summons in the post office, if the same shall have been deposited; or

4. The written admission of the defendant :

In case of actual service, the certificate or affidavit shall state the time and place of the service.

## TITLE VI.

### Of the pleadings in civil actions.

#### CHAPTER I. THE COMPLAINT.

##### II. THE DEMURRER.

##### III. THE ANSWER.

##### IV. THE REPLY.

##### V. GENERAL RULES OF PLEADING.

##### VI. MISTAKES IN PLEADING, AND AMENDMENTS.

### CHAPTER I.

#### THE COMPLAINT.

SECTION 118. Forms of pleadings heretofore existing, abolished.

119. First pleading to be complaint.

120. What it must contain.

§ 118. All the forms of pleading heretofore existing, are abolished ; and hereafter, the forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, shall be those which are prescribed by this act.

As has been already remarked, the change in the mode of pleading is the key of the reform which we propose. Without this, we should despair of any substantial and permanent improvement in our modes of legal controversy. With, it we think we can frame a code of legal procedure, simple in its construction, easily understood and efficient for all the purposes of justice.

The pleadings, we have said, are the written allegations of the parties of the cause of action on one side, and the defence on the other. Their object is three-fold : to present the facts on which the court is to pronounce the law ; to present

them in such a manner, as that the precise points in dispute shall be perceived, to which the proofs may be directed; and to preserve the record of the rights determined. Not one of these objects is gained by the law of pleading as it now exists in this state. They are all evaded.

Different modes of pleading are used, according as the case is of legal or of equitable cognizance. We have already explained their history. In a remote period of English law, an action was commenced by what was called an original writ, issued out of the chancery, describing briefly the cause of action, and returnable before one of the courts of common law. It was this which gave jurisdiction to the court, the writ being at once a summons to the defendant, and a commission to the judges to take cognizance of the case. It can be traced to the time of Henry II., and came, it is supposed, from Normandy, being brought into England at the conquest. It certainly was unknown to the Anglo Saxons.

On the return of the writ to the court of common law the pleading commenced. The plaintiff repeated the writ and the defendant answered it. The allegations at first were made orally and taken down by the clerk. Oral pleadings were discontinued about the middle of the fourteenth century, but the same forms were used as before, and even now the record is framed as though the parties or their attorneys made their allegations in open court. The record was kept in Norman French until the year 1353, from that time until 1730, in Latin, and since then, by act of parliament, in English.

The pleadings were short and simple at first, but by degrees their character in this respect was entirely changed. Many of them are now in the year books. Any one who will look there, will see how different were the forms in their origin and in our day.

The original writs were couched in set forms. If there happened to be no form suitable for the complaint, and the case were analagous to a case already provided for, the clerks in chancery were authorized to form a writ upon the case. But there were many causes of complaint for which no writ analagous to

one existing could be devised, and in these the court of chancery itself, not being straightened by forms, undertook to administer the necessary relief. We see then at a glance the origin of the difference between the various forms of actions at law and between law and equity, The original writs being in set forms and classified, created the variety and distinction of actions, and these actions being altogether too narrow for many cases deserving of remedy, the chancellor supplied the deficiency by taking the case into his own hands.

It will thus be perceived that but for the set forms of the common law, there would have been no occasion for a court of equity. The one grew out of the other. It will be perceived, also, that these forms are not indigenous to the Anglo Saxons, but were brought from abroad and imposed on them by conquest. Our most valued institutions came to us from the Saxons. The trial by jury is of Saxon origin, and certainly is in no way connected with the forms of action.

The actions thus commenced by different writs, continued different in form throughout their whole duration. Each had rules peculiar to itself. At one time it is supposed there were fifty-nine of them. They have been gradually reduced, till we have now in this state but ten. The principle upon which they rest, if principle it can be called, is a fallacy. It is this, that all necessary remedies could be foreseen, a foresight as impossible as that of future events. The system has, therefore, been a failure, and the enormous growth of the court of chancery the consequence. No new action has been devised within the last three hundred years; and the courts of law of republican New-York, in the nineteenth century, are administering justice, in the forms of the courts of monarchical England, in the sixteenth.

The narrow rules which the courts applied to the construction of the pleadings, requiring the proof to correspond with the allegation in the most literal sense, led to repetitions and to the use of different counts, as different modes of stating the same case. Thus the pleadings came to be that mass of verbiage which they now are.

There are many treatises and books of forms, indispensable to the lawyer, on the mode of pleading and the forms of the allegations. The rules and the commentaries upon them, form one of the most technical and abstruse branches of the law ; a science as some persons delight to call it. It has been praised as a logical and useful science. We are more disposed to pronounce it a system of dialectics, very fit for the schoolmen with whom it originated, but unfit for the practical business of life.

So unfit has it been found, that in instances almost numberless, the legislature and the courts have departed from it and gone to the other extreme. Thus the rule, which for the sake of singleness of issue allowed but one answer to one pleading, was changed by the statute of Anne, so as to allow as many pleas as the party desired, and by our Revised Statutes still further, so as to allow different replications to the same plea. A form of plea was devised which in many cases would virtually deny every material allegation of the declaration without disclosing any particular defence. The courts from time to time have admitted new defences under these general issues, and still further to encourage them, a statute has been passed allowing the defendant to plead the general issue, and with it give notice of any defence, which he could not otherwise introduce under such issue. And more than that, the legislature allows public officers when prosecuted for official acts, to plead the general issue and give any defence in evidence without notice. This is gross inconsistency : for if special pleading promotes justice, it should be adhered to inflexibly, while if it defeats justice, all parties should be freed from its shackles. This statute, therefore, is not only abhorrent to our ideas of equality before the law, but it passes sentence of condemnation upon the fundamental rule of pleading.

Besides the general issues, we have general declarations, or in technical language, common counts. These have been so contrived as to give no information of the particular demand. They also have been encouraged by the courts and numberless demands allowed to be proven under them. The extent to which they are used is shown by the fact, that out of 89 cases taken at random from the records of the courts, 18 had the common counts alone, and 42 other the same counts,

with copy of note or bill of exchange annexed. Thus, there has been a constant struggle of the pleaders and the courts, to evade their own rules. They made them and they defend them as the means of eliciting the precise point in dispute, and they seek every means in their power, to conceal it under the most general allegations.

In truth the arguments of those who defend the present system destroy each other. One is the advantage of having the question of fact drawn out so precisely, that the court and jury may see what they have to try, and the parties be prepared with their proofs; the other is the advantage of having the facts stated in so general a form, that the allegations shall cover any state of facts that may appear on the trial, or in other words, the advantage of having no question of fact drawn out by the pleadings at all.

Having thus explained the system now existing in this state, we are tempted to ask, what good purpose it serves? Can any one tell the benefit, that arises from the division of actions into covenant, debt, trespass, case, replevin! What motive is there for one form of action when a note is sealed, and for another when the note is unsealed? Is there a reason, why the allegations of the parties should not be made in language, which themselves understand? Is there a reason, why they should not be true? There is no magic in forms. Since the facts give the right to relief, it must be proper, that they should be stated as they exist. It is impossible, that there can be a good reason, why they should be stated untruly, or in any other language, than that in which they will be explained to the court and jury on the trial.

In place of the system which we have thus explained, we propose one that appears to us natural and simple, easily understood, and capable of effecting every good object, which any system can effect. We propose, that the plaintiff shall state his case according to the facts, and ask for such relief as he supposes himself entitled to; that the defendant shall by his answer point out his defence distinctly. This form of allegation and counter allegation will make the parties disclose the cause of action and defence, so that they

may each come to the trial prepared with the necessary proofs. If the defendant in his answer allege a matter not referred to in the complaint, but which he insists constitutes a defence, the plaintiff may reply to the new matter. But there the pleadings close. Should the reply contain new matter, it is to be deemed denied by the defendant either absolutely or as capable of being explained away, and therefore, not having the effect intended. So that when the reply does not contain new facts, we have a real issue; when it does so, we have, a constructive issue, just such an one in fact as we now have, when *non est factum* is pleaded in *covenant*, with notice of special matter. We conceive that taking the cases together, it is better to stop with the reply. There would scarcely ever happen a case, where it would be of any use to go further, were the parties at liberty to do so. By the time the reply is made, the facts will have been so developed, as to leave no doubt of the precise point in dispute. If the right to go further, however, were given, it would be liable to abuse and frequently cause delays. In chancery no pleading is allowed beyond the replication. In Louisiana none is allowed beyond the answer.

In certain cases, we have allowed a demurrer to the complaint, as being the shortest way to dispose of the objection, which the defendant has a right to take. But we have so guarded it, that we think it can scarcely be abused; and we have not permitted a demurrer to an answer or reply in any case.

The system of pleading, which now exists has become so vexatious and oppressive, and the one which we propose appears to us so favorable to the rights of the parties, and the acceleration of justice, that we might perhaps have contented ourselves, with presenting to the legislature and the people the two systems side by side. But we are unwilling to leave any objections unanswered, and will therefore, examine such as have been mentioned or have occurred to us.

It has been said, that the mode of pleading by complaint, answer and reply, is incompatible with a trial by jury. We cannot assent to this position. In the first place the ex-

perience of Louisiana and Scotland is decisive. In Louisiana the only pleadings are petition and answer. These are laid before the jury, who endorse their verdict upon the petition. All civil causes are tried by jury, when either party desires it. We have heard of no complaint, that the issues are not well defined, or that the juries cannot perform their appropriate functions.

In Scotland, trial by jury in civil cases, has existed since 1815. The pleadings are uniform and are contained in the summons and defence. Thereupon, issues are framed and stated in short questions, under the direction of a clerk of the court.

In the next place if there were no experience to which we could appeal, we should still arrive at the same conclusion. We think the prevalent idea that nothing but common law issues are fit for a jury, is a mere illusion. It is assumed, that the production of the issue in that mode, disentangles the case, lessens the number of questions of fact, and separates them from the questions of law. The assumption appears to us unfounded.

It is by no means clear, that the production of an issue according to the course of the common law, does really lessen the number of questions of fact. The declaration may contain any number of counts, each containing a distinct cause of action, or the same cause of action in different forms. If there be the same plea to all the counts, there will be as many issues as counts. But the defendant may present as many pleas to each count as he pleases, and the plaintiff, with leave of the court, as many replications to each plea, as he may happen to have answers to it. Suppose then, what frequently happens, that a declaration contains five counts, that there are three pleas to each count, with but a single replication to each plea. Here are fifteen issues: and if there be two replications to each plea, there will be thirty. In the case of the *People against the Kingston and Middletown Turnpike Company*, (23 *Wendell*, 193,) there were thirty replications to the plea. Indeed, the effect of the system has been to raise up

issues upon verbal distinctions, and thus far to increase rather than diminish the number of questions.

Disentangling the questions and separating those of fact and of law, is rarely effected by the present system of pleading at common law. The severest application of the rules, when they have developed the issues, will be found, on a strict analysis, to have brought out only complex questions, comprehending others less general, of fact and of law. This is necessarily so, so long as the pleadings state the conclusions of fact, instead of the facts themselves. The issues of tender, payment, fraud, release, marriage, devise, property, in trover, or replevin, or title in trespass, or ejectment, are all complex questions, involving the decision of other and subordinate ones.

It will hardly be possible to reduce questions to all their elements before trial. What ultimate questions may arise, cannot be known till the evidence is disclosed. The most skilful pleading will lead only to an approximation greater or less according to the nature of the original questions. And it is for the reason that our issues do thus present complex questions, both of law and fact, that the jury is permitted, in all cases, to find a special verdict setting forth in detail the facts, tending to prove or disprove the affirmative of the issue, and referring the conclusion from these facts to the court.

The trial is now the only place where there is any thing analogous to the ancient oral pleading. That was in the presence of the court, and rested under its supervision, being in fact nothing more than the forming of an issue by the judge from the respective allegations of the parties. Indeed our system had its origin in a practice now obsolete. When the presence of the judge was withdrawn, it lost an essential part of its real character. Its present substitute is the trial. There the plaintiff opens his case and calls his witnesses, the defendant does the same; when the testimony is finished, the defendant goes over his case again, and makes his statement of the points and of the evidence. The plaintiff follows with his. Thereupon the judge charges the jury. Then comes the true analysis of the case; the development of the real points in the con-

trover, which no system of special pleading can dispense with.

We hope we have shown, that there are no substantial advantages derived from the present system of pleading. How great, on the other hand, are its disadvantages?

First. The present pleadings are many of them untrue. The declaration in trover is almost always false. The common counts and general issues in assumpsit are generally false. So are the statement of the venue, and the averments of time and place, in most of the actions. We need not go into further particulars to show, that truth, which ought to be the first essential in the proceedings of courts of justice, is not only disregarded generally, and upon system, but that the disregard of truth is forced upon the parties by the present system of pleading.

Not only is this an evil of itself, but it would prevent our applying to pleadings that test, which we propose to apply, that of a verification by the oath of the party. Such a verification appears to us desirable, both as a means of preventing groundless suits and defences, and of compelling the parties respectively to admit the undisputed facts; but it is obviously impossible, unless the forms of action are abolished, and a system substituted, which shall enable the parties to state truly the facts, constituting the cause of action or defence.

Second. The present system of pleading cannot be retained, unless we retain also the distinction between legal and equitable remedies. The wit of man could never assimilate the action of trover and a suit in equity. The question then really comes to this: Shall the separate systems of law and equity be continued, or shall they be blended in a uniform mode of proceeding? On our part, we have no difficulty in answering, that they should be blended. We think that the present constitution of the state indicates it, that the people expect it, and that the highest policy requires it.

When, at the late revision of the constitution, the people vested the two jurisdictions in one court, they could scarcely have intended that the two should be kept distinct. If they did.

why were the two vested in one court? All experience shows, that division of labor is most favorable to success, and if there are always to be two distinct systems, one of law and the other of equity, it were far better that they should be confided to distinct hands. The people, however, we are persuaded, had other views. They united the two in one hand, that it might be seen that the division itself was no longer necessary.

The objections to separate systems of remedies, are first, the difficulty of fixing always the limits of the respective jurisdictions; and secondly, the frequent necessity of using both to determine one controversy.

Shall we be told, that the jurisdictions are clearly defined, and that, if mistaken, it must be the fault of the party? Every person conversant with the subject, knows that it is often one of great doubt, and that the courts themselves are involved in contradictory decisions. The other objection to the two jurisdictions is still stronger. It cannot be wise to keep the machinery of justice so imperfect that one court shall not be able to decide the whole of a cause. Every bill that is filed in aid or defence of a suit at law, and every creditor's bill is a witness against our legal establishment. Though courts of equity have a rule, that when they have acquired jurisdiction for one purpose, they will retain it, so as to do complete justice between the parties, there are instances where a party is sent to law, after having obtained all that a court of equity could give him. So are there numerous instances, of parties driven into a court of equity to obtain adequate relief, after having exhausted all the powers of a court of law. And it has even happened, that there were different portions of the same claim, of which one belonged to a legal, and the other to an equitable tribunal.

The change which we propose in the system of pleading is radical, as it ought to be, and permanent. We are persuaded it will accomplish a great good. It cannot injure the substantial rights of any party. No rule of law, by which rights and *wrongs* are measured, will be touched, the object and effect of

the change being only the removal of old obstructions, in the way of enforcing the rights, and redressing the wrongs.

§ 119. The first pleading on the part of the plaintiff, is the complaint.

§ 120. The complaint shall contain :

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the plaintiff desires the trial to be had, and the names of the parties to the action, plaintiff and defendant :

2. A statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended :

3. A demand of the relief, to which the plaintiff supposes himself entitled. If the recovery of money be demanded, the amount thereof shall be stated.

## CHAPTER II.

## THE DEMURRER.

SECTION 121. Defendant to demur or answer.

122. When defendant may demur.

123. Demurrer must specify grounds of objection to complaint.

124. After demurrer plaintiff may amend within twenty days.

125. How to proceed if complaint be amended.

126. Objection not appearing on complaint may be taken by answer.

127. If neither, defendant deemed to have waived it except as to jurisdiction and cause of action.

§ 121. The only pleading on the part of the defendant, is either a demurrer or an answer. It must be served within twenty days after service of the copy of the complaint.

§ 122. The defendant may demur to the complaint, when it shall appear upon the face thereof, either :

1. That the court has no jurisdiction of the person of the defendant, or the subject of the action ; or
2. That the plaintiff has not legal capacity to sue ; or
3. That there is another action pending between the same parties, for the same cause ; or
4. That there is a defect of parties, plaintiff or defendant ; or
5. That several causes of action have been improperly united ; or
6. That the complaint does not state facts sufficient to constitute a cause of action.

§ 123. The demurrer shall distinctly specify the grounds of objection to the complaint. Unless it do so, it may be disregarded.

§ 124. After a demurrer, the plaintiff may amend, of course, and without costs, within twenty days. Upon the decision of the demurrer, the court may, if justice require it, allow the plaintiff to amend, or the defendant to withdraw his demurrer and to answer.

§ 125. If the complaint be amended, a copy thereof must be served on the defendant, who must answer it within twenty days, or the plaintiff upon filing with the clerk an affidavit of the service, and of the defendant's omission, may proceed to obtain judgment, as provided by section 202, but where an application to the court for judgment is necessary, eight days notice thereof must be given to the defendant.

§ 126. When any of the matters enumerated in section 122, do not appear upon the face of the complaint, the objection may be taken by answer.

§ 127. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject of the action; and the objection that the complaint does not state facts sufficient to constitute a cause of action.

## CHAPTER III.

## THE ANSWER.

SECTION. 128. Answer what to contain.

129. May set forth all the grounds of defence.

130. If no reply and judgment on answer, plaintiff may amend.

§ 128. The answer of the defendant shall contain :

1. In respect to each allegation of the complaint controverted by the defendant, a specific denial thereof, or of any knowledge thereof sufficient to form a belief ;
2. A statement of any new matter constituting a defence, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.

§ 129. The defendant may set forth in his answer, as many grounds of defence as he shall have. They shall be separately stated, and may refer to the causes of action which they are intended to answer, in any manner by which they may be intelligibly distinguished.

§ 130. If the answer set up new matter which is not replied to as provided in the next section, and the action be tried on complaint and answer alone, and judgment be given thereon for the plaintiff, the court may permit the defendant to withdraw or amend the answer, upon such terms as shall be just.

## CHAPTER IV.

### THE REPLY.

**SECTION. 131.** Reply, when to be put in, and what to contain.

§ 131. When the answer shall contain new matter, the plaintiff may within twenty days, reply to it, denying particularly each allegation controverted by him, or any knowledge thereof sufficient to form a belief; and he may allege, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended, any new matter not inconsistent with the complaint, in avoidance of the answer.

The reply is introduced, in order to give the defendant the benefit of having the allegations in his answer, which the plaintiff does not deny, taken as true, in the same manner as those of the complaint not denied in the answer.

It is also just that the plaintiff should apprise the defendant of any matter he intends to set up in avoidance of the answer.

In most cases the issue will be complete without a reply. It will only be necessary, where there is new matter in the answer, the truth of which the plaintiff controverts. It has been often suggested, in regard to the old system of chancery practice, that if the plaintiff were bound to specify in his replication, the particular parts of the answer he intended to controvert, it would narrow the issue and save much testimony.

## CHAPTER V

## GENERAL RULES OF PLEADING.

SECTION 132. No pleading but complaint, demurrer, answer and reply.

133. Pleading to be verified.

134. Need not state presumptions of Law, nor matters judicially noticed.

135. How to state an account.

136. To be liberally construed.

137. Irrelevant and redundant matter to be stricken out.

138. Judgments, how to be pleaded.

139. Conditions precedent, how to be pleaded.

140. Private statutes, how to be pleaded.

141. Libel and slander, how stated in complaint.

142. What answer may contain, in such cases.

143. What causes of action may be joined in the same action.

144. Allegation not denied, to be deemed true.

These rules perhaps sufficiently explain themselves. Their object is, to dispense with unnecessary statements, to require conciseness, and to unite in one action, all the controversies between the same parties which can be conveniently disposed of together.

§ 132. No other pleading shall be allowed, than the complaint, demurrer, answer and reply.

§ 133. Every pleading must be subscribed by the party, or his attorney, and the complaint, answer and reply, must be verified by the party, his agent or attorney, to the effect that he believes it to be true. But the verification may be omitted, when the party would be privileged from testifying, as a witness, to the same matter. And no pleading, verified as herein required, shall be used in a criminal prosecution against the party, as proof of a fact admitted or alleged in such pleading.

By the verification of pleadings in the qualified manner here proposed, several important advantages are gained. The system of pleading heretofore in use, has encouraged, if it has not absolutely required, fictitious statements, until men otherwise scrupulous, have lost sight of all limits of veracity in

the character of their allegations in pleading. It is designed to bring back to legal allegations, made in solemn form in writing, at least the same regard to truth, that prevails between members of society, in their daily communications to one another. It is not required of a party, that he state absolutely, that the matters pleaded are true, inasmuch as his knowledge may not extend to the whole case; but it is intended to put him upon his veracity, and to require him to state nothing, that he does not believe to be true.

It will have a beneficial effect, under the rule provided in section 114, that matters alleged by the one party, and not denied in the pleading of his adversary, shall be taken as true. By this means the issue is narrowed down to the real matter in controversy between the parties, and all the facts in the case, about which, out of court, there is no real difference, are established on the trial, without the trouble and expense of calling witnesses.

It often happens that witnesses are dead, or absent, and in such case the verification required to the denial, may save the right of action. It is true, that an unconscientious man might tell his attorney a falsehood, and induce him to believe it, and to swear to the pleading, yet under the present system, without oath, the most scrupulous man does not hesitate to plead the general issue, which often includes a denial of what he would not deny in conversation. Under the present system, also, the defendant is obliged to swear that he believes he has a good defence, before he is permitted to defend on the trial. If this be just, it cannot be wrong to require the same oath of both parties, at an earlier stage of the action, and before they have put a falsehood in their pleading on the files of the court.

§ 134. Neither presumptions of law, nor matters of which judicial notice is taken, need be stated in a pleading.

§ 135. It shall not be necessary for a party to set forth in a pleading, the items of an account therein alleged,

where they exceed twenty in number ; but he shall deliver to the adverse party, within ten days, after a demand thereof in writing, a copy of the account verified by his own oath, or that of his agent, or attorney, to the effect that he believes it to be true, or be precluded from giving evidence thereof.

§ 136. In the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view to substantial justice between the parties.

§ 137. If irrelevant or redundant matter be inserted in a pleading, it may be stricken out, on motion of any person aggrieved thereby.

§ 138. In pleading a judgment, or other determination of a court, or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish on the trial, the facts conferring jurisdiction.

§ 139. In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts, showing such performance ; but it may be stated generally, that the party duly performed all the conditions on his part ; and if such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts showing such performance.

§ 140. In pleading a private statute, or a right derived therefrom, it shall be sufficient to refer to such statute, by its title and the day of its passage, and the court shall thereupon take judicial notice thereof.

§ 141. In an action for libel or slander, it shall not be necessary to state in the complaint, any extrinsic facts, for the purpose of showing the application to the plaintiff, of the defamatory matter out of which the cause of action arose; but it shall be sufficient to state generally, that the same was published, or spoken concerning the plaintiff, and if such allegation be controverted, the plaintiff shall be bound to establish, on the trial, that it was so published or spoken.

§ 142. In the actions mentioned in the last section, the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances, legally admissible in evidence, to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances.

The last two sections are designed to simplify the rules of pleading in libel and slander, in particulars in which the present rules are full of inconvenience and injustice.

Where the defamatory matter does not refer directly to the plaintiff, but is connected with him by extrinsic facts, these facts must be set forth by way of preface or inducement; and so technical has this rule become, that it is frequently very difficult in pleading to show this connection to the satisfaction of the court. The real question is, was the plaintiff intended by the defamatory charge? This, it seems to us, should be matter of evidence, and not of pleading. The

rule, as laid down in a leading case, in our courts on the subject, (*Miller v. Maxwell*, 16 Wend. 9,) requires that the extrinsic facts should be so stated as that when read in connection with the defamatory charge, and with the *innuendoes* connecting it with the introductory matter, the conclusion will be inevitable, that the plaintiff is the person intended to be slandered. The difficulty of doing so is illustrated in the case just cited. There the plaintiff, in an action for libel, averred, by way of *innuendo*, that the defendant, in attributing the authorship of a printed article to *a celebrated surgeon of whiskey memory*, or to *a noted steam doctor*, meant the plaintiff; and it was held, notwithstanding the *innuendo*, that the declaration was bad, for the want of an averment in the introductory part thereof, that the plaintiff was generally known by these appellations, or that the defendant was in the habit of applying to him these opprobrious epithets. And in a more recent case, (*Tyler v. Tillotson*, 2 Hill, 507,) where a declaration for a libel alleged that the plaintiff was the editor of a newspaper called the *Ogdensburgh Times*, and that the defendant published of and concerning him, as editor of the said paper, the following words: "We shall, from time to time, &c., notwithstanding the denial of the ribald convict and recorded libeller who *edits* the *Times*, (meaning the plaintiff the editor of the aforesaid newspaper,) called the *Ogdensburgh Times*," &c, it was held, that the declaration was bad, as it contained no sufficient averment showing that the libel referred to, and was intended to designate the plaintiff.

The rule proposed in section 142, is intended to remedy what we suppose to be a most flagrant injustice to the defendant in actions of this nature. By the existing law, if the defendant plead or give notice of truth in justification, he is precluded, not only from giving any evidence in mitigation of damages, but from availing himself for that purpose of any facts shewn under his plea of justification, (though they establish the utmost probable cause for making the charge, and the entire good faith of the defendant in doing so,) if the proof fall short of a strict technical justification. And not only this, but it is the well settled rule, and juries are uniformly so instructed, that the fact of his pleading or giving notice of a

justification, is, of itself, evidence of malice, and must be taken into view in enhancing the damages. We can see no reason why in this, more than in any other case, an arbitrary rule should be interposed, by which the defendant should be deprived, not only of the benefit of, but should actually be prejudiced by, a partial defence. Besides, the rule as proposed, seems necessary under our system of pleading, by which the general issue, as now understood, is taken away, and which allows the defendant to plead as many grounds of defence as he may have.

§ 143. The plaintiff may unite several causes of action in the same complaint, where they all arise out of,

1. Contract, express or implied ; or,
2. Injuries by force, to person or property ; or,
3. Injuries without force to person or property ; or,
4. Injuries to character ; or,
5. Claims to recover real property ; with or without damages, for the withholding thereof ; or,
6. Claims to recover personal property, with or without damages, for the withholding thereof ; or,
7. Claims against a trustee by virtue of a contract or by operation of law.

But the causes of action, so united, must all belong to one only of these classes, and must equally affect all the parties to the action, and not require different places of trial.

§ 144. Every material allegation of the complaint, not specifically controverted by the answer, as prescribed in section 128 ; and every material allegation of new matter in the answer, not specifically controverted by the re-

ply, as prescribed in section 131, shall for the purposes of the action, be taken as true. But the allegation of new matter in a reply, shall not in any respect conclude the defendant, who may on the trial avail himself of any valid objection to its sufficiency, or may countervail it by proofs, either in direct denial or by way of avoidance.

## CHAPTER VI.

### MISTAKES IN PLEADING, AND AMENDMENTS.

- SECTION** 145. Material variances, how provided for.  
 146. Immaterial variances, how provided for.  
 147. What to be deemed variances.  
 148. Amendments by the party.  
 149. Amendments by the court.  
 150. When real name unknown, fictitious name may be used, and amended afterwards.  
 151. No error or defect to be regarded, unless it affect substantial rights.  
 152. Supplemental complaint, answer and reply.

To that class of objectors, who assert, that the pleadings, we propose, will sometimes prevent a party, from proving the real state of his case, when it was imperfectly known to him at the commencement of the action, or imperfectly explained to his counsel, we present these sections as an answer. No person, under our system, need be turned out of court, or lose his remedy for variance of any kind. The first three sections provide for variances discovered at the trial; and the rest provide a means of amendment of the most liberal character; as liberal, indeed, as we could devise.

§ 145. No variance between the allegation in a pleading and the proof, shall be deemed material, unless it have actually misled the adverse party, to his prejudice, in maintaining his action or defence, upon the merits. Whenever it shall be alleged, that a party has been misled, that fact shall be proved to the satisfaction of the court, by affidavit, shewing in what respect he has been

misled; and thereupon, the court may order the pleading to be amended, upon such terms as shall be just.

§ 146. Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

§ 147. Where, however, the allegation of the cause of action or defence to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it shall not be deemed a case of variance, within the last two sections, but a failure of proof.

§ 148. Any pleading may be amended by the party of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it shall expire. In such case a copy of the amended pleading shall be served on the adverse party.

§ 149. The court may, at any time, in furtherance of justice, and on such terms as may be proper, amend any pleading or proceeding, by adding or striking out the name of any party, or a mistake in any other respect, or by inserting other allegations, material to the case, or by conforming the pleading or proceeding to the facts proved, whenever the amendment shall not change substantially the cause of action or defence.

§ 150. When the plaintiff shall be ignorant of the name of a defendant, such defendant may be designated in any pleading or proceeding, by any name ; and when his true name shall be discovered, the pleading or proceeding may be amended accordingly.

§ 151. The court shall, in every stage of an action, disregard any error, or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party ; and no judgment shall be reversed or affected by reason of such error or defect.

§ 152. The plaintiff and defendant respectively, may be allowed, on motion, to make a supplemental complaint, answer or reply, alleging facts material to the case, occurring after the former complaint, answer or reply.

## TITLE VII.

### **Of the provisional remedies in civil actions.**

#### **CHAPTER I. ARREST AND BAIL.**

#### **II. CLAIM AND DELIVERY OF PERSONAL PROPERTY.**

#### **III. INJUNCTION.**

#### **IV. OTHER PROVISIONAL REMEDIES.**

Provisional remedies are those which are applied before judgment, with a view of rendering it effectual, whatever it may be.

The provisions of this title need little explanation. The first chapter is a substitute for all the present statutes, providing for the arrest of persons upon civil process, before execution. We have adhered generally to the principle of the existing laws, although, in some respects, we have restricted the right of arrest, particularly by requiring in all cases an order of a judge, and in most cases, an affidavit that the defendant is not a resident of the state, or is about to remove from it. We have also provided, that, before an arrest, the plaintiff must give security to pay the defendant's costs, and whatever damages he may sustain by the arrest. We have also proposed, that the defendant may make a deposit of money in all cases, instead of giving bail.

It is also a part of our plan, that the provisional remedies should be applied at any time, during the progress of the suit, and not alone at the commencement, as must now be done. Cases often arise, not foreseen at the commencement of the action, in which justice requires the arrest of the defendant or the delivery of personal property, or an injunction. The writ of *ne exeat*, or equitable bail, we propose to abolish, as unnecessary under our system.

## CHAPTER I.

## ARREST AND BAIL.

- Section** 153. No person to be arrested, except as prescribed by this act.  
 154. Cases in which defendant may be arrested.  
 155. Order for arrest, how obtained.  
 156. Affidavit to obtain order, what to contain.  
 157. Security by plaintiff, on obtaining order.  
 158. Order, when made and its form.  
 159. Affidavit and order to be delivered to sheriff, and copy to be given to defendant.  
 160. Arrest, how made.  
 161. Defendant, how discharged.  
 162. Undertaking of bail.  
 163. } Surrender of defendant.  
 164. }  
 165. Bail, how proceeded against.  
 166. Bail, how exonerated.  
 167. Delivery of order of arrest and undertaking to plaintiff, and his rejection of the undertaking.  
 168. Notice of justification.  
 169. Qualifications of bail.  
 170. } Justification of bail.  
 171. }  
 172. Deposit of money with sheriff.  
 173. Payment of same into court by sheriff.  
 174. Substituting bail, for deposit.  
 175. Money deposited, how applied.  
 176. Sheriff when liable as bail; and his discharge from liability.  
 177. Proceedings on judgment against sheriff.  
 178. Bail liable to sheriff.  
 179. } Motion to vacate order of arrest, or reduce bail.  
 180. }

§ 153. No person shall be arrested in a civil action, except as prescribed by this act; but this provision shall not affect the act to abolish imprisonment for debt, and to punish fraudulent debtors, passed April 26, 1831, or any act amending the same, nor shall it apply to proceedings for contempts.

§ 154. The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages, on a *cause of action* not arising out of contract.

2. In an action for a fine or penalty, or on a promise to marry, or for moneys collected by a public officer, or by an attorney, solicitor or counsellor, in the course of his employment as such, or by any person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

3. In an action to recover the possession of personal property unjustly detained, where the property shall not have been delivered to the plaintiff or security given therefor, as provided in the next chapter.

But no female shall be arrested in an action arising on contract, or in any other action, except for a wilful injury to person, character or property.

§ 155. An order for the arrest of the defendant, must be obtained from a judge of the court in which the action is brought, or from a county judge.

§ 156. The order may be made, where it shall appear to the judge by the affidavit of the plaintiff, or of any other person, that a sufficient cause of action exists, and (excepting in the cases mentioned in the second subdivision of section 154,) that the defendant is not a resident of the state, or is about to remove therefrom.

§ 157. Before making the order, the judge shall require a written undertaking, on the part of the plaintiff, with or without sureties, to the effect, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum specified in the undertaking, which shall be at least

two hundred and fifty dollars. If the undertaking be executed by the plaintiff, without sureties, he shall annex thereto an affidavit that he is a resident and householder or freeholder within the state, and worth double the sum specified in the undertaking, over all his debts and liabilities.

§ 158. The order may be made at the time of commencing the action, or at any time afterwards, before judgment. It shall require the sheriff of the county, where the defendant may be found, forthwith to arrest him and hold him to bail in a specified sum, and to return the same at a time and place therein mentioned, to the plaintiff or attorney by whom it shall be subscribed or endorsed.

§ 159. The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver to him a copy thereof.

§ 160. The sheriff shall execute the order, by arresting the defendant and keeping him in custody, until discharged by law; and may call the power of the county to his aid, in the execution of the arrest, as in case of process.

§ 161. The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail, or upon depositing the amount mentioned in the order of arrest, as provided in this chapter.

§ 162. The defendant may give bail, by causing a *written undertaking* to be executed by two or more sufficient

bail, stating their places of residence and occupations, to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein.

§ 163. At any time before a failure to comply with their undertaking, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner :

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon; as upon an order of arrest, and shall by a certificate in writing, acknowledge the surrender.

2. Upon the undertaking and sheriff's certificate, a judge of the court or county judge, may, upon a notice to the plaintiff, of eight days, with a copy of the undertaking and certificate, order that the bail be exonerated; and on filing the order and the papers used on such application, they shall be exonerated accordingly.

§ 164. For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority, endorsed on a certified copy of the undertaking, may empower any person of suitable age and discretion to do so.

§ 165. In case of failure to comply with the undertaking, the bail may be proceeded against by action only.

§ 166. The bail may be exonerated, either by the death of the defendant, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution thereof, within twenty days after the commencement of the action against the bail, or within such further time as may be granted by the court.

§ 167. Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the plaintiff or attorney by whom it is subscribed, with his return endorsed, and the undertaking of the bail. The plaintiff, within ten days thereafter, may return the undertaking to the sheriff, with a notice that he does not accept it; or he shall be deemed to have accepted it, and the sheriff shall be exonerated from liability.

§ 168. On the receipt of the undertaking and notice, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or attorney by whom the order of arrest is subscribed, notice of the justification of the same or other bail, (specifying the places of residence and occupations of the latter,) before a judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bail be given, there shall be a new undertaking, in the form prescribed in § 162.

§ 169. The qualifications of bail must be as follows :

1. Each of them must be a resident, and householder or freeholder, within the state.

2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution, but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification be equivalent to that of two sufficient bail.

§ 170. For the purpose of justification, each of the bail shall attend before the judge, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the judge, in his discretion, may think proper. The examination shall be reduced to writing and subscribed by the bail.

§ 171. If the judge find the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and deliver the same to the plaintiff, or cause them to be filed; and the sheriff shall thereupon be exonerated from liability.

§ 172. The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall thereupon give the defendant a certificate of the deposit, and the defendant shall be discharged out of custody.

§ 173. The sheriff shall within four days after the deposit, pay the same into court; and shall receive from the clerk two certificates of such payment, the one of which he shall deliver to the plaintiff, and the other to the defendant. For any default in making such pay-

ment, the same proceedings may be had on the official bond of the sheriff to collect the sum deposited, as in other cases of delinquency.

§ 174. If money be deposited, as provided in the last two sections, bail may be given and justified upon notice as prescribed in section 168, any time before judgment ; and thereupon the judge before whom the justification is had, shall direct, in the order of allowance, that the money deposited be refunded by the sheriff to the defendant, and it shall be refunded accordingly.

§ 175. Where money shall have been so deposited, if it remain on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk shall under the direction of the court, apply the same in satisfaction thereof and after satisfying the judgment, shall refund the surplus, if any, to the defendant. If the judgment be in favor of the defendant, the clerk shall refund to him the whole sum deposited and remaining unapplied.

§ 176. If, after being arrested, the defendant escape or be rescued, or bail be not given and justified, or a deposit be not made instead thereof, the sheriff shall himself be liable as bail. But he may discharge himself from such liability, by the giving and justification of bail as provided in sections 168, 169, 170 and 171, at any time before process against the person of the defendant, to enforce an order or judgment in the action.

§ 177. If a judgment be recovered against the sheriff, upon his liability as bail, and an execution thereon be

returned unsatisfied in whole or in part, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency.

§ 178. The bail taken upon the arrest shall, unless they justify, or other bail be given and justified, be liable to the sheriff, by action, for all damages which he may sustain by reason of such omission.

179. A defendant arrested, may, at any time before the justification of bail, apply, on motion, to vacate the order of arrest, or to reduce the amount of the bail.

§ 180. If the motion be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made.

## CHAPTER II.

### CLAIM AND DELIVERY OF PERSONAL PROPERTY.

SECTION 181. Immediate delivery of personal property may be claimed, when action is commenced.

182. Affidavit, and its requisites.

183. Requisition to sheriff, to take and deliver the property.

184. Security on the part of plaintiff, and justification.

185. On failure to justify, sheriff to deliver property to defendant.

186. Defendant entitled to delivery, on giving security.

187. Justification of defendant's sureties.

188. Qualifications and justification of sureties.

189. Property how taken, when concealed in building or enclosure.

190. Property, how kept.

This chapter is intended to supply the provisional relief, which is now obtained in the action of replevin. We think it will be found much simpler, than the statute for which it is a substitute.

The most material change which will be observed, is in section 186 and 187, which provide a means for the defendant's retaining the property, on giving an undertaking equal to that which the plaintiff has given. This seems but just. The defendant being in possession, is presumed to be rightfully so, until the contrary is proved; and if he is willing to give as good security as the plaintiff, he should be allowed to retain the property, during the litigation.

§ 181. The plaintiff, in an action to recover the possession of personal property, may, at the time of commencing the action, claim the immediate delivery of such property, as provided in this chapter.

§ 182. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing,

1. That the plaintiff is the owner of the property claimed, (particularly describing it,) or is lawfully entitled to the possession thereof, by virtue of a special property therein; the facts in respect to which shall be set forth:

2. That the property is wrongfully detained by the defendant:

3. The alleged cause of the detention thereof, according to his best knowledge, information and belief:

4. That the same has not been taken for a tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or if so seized, that it is, by statute, exempt from such seizure; and

5. The actual value of the property.

§ 183. The plaintiff may, thereupon, by an endorsement in writing upon the affidavit, require the sheriff of

the county where the property claimed may be, to take the same from the defendant, and deliver it to the plaintiff.

§ 184. Upon the receipt of the affidavit and notice, with a written undertaking, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound, in double the value of the property as stated in the affidavit, for the prosecution of the action, for the return of the property to the defendant, if return thereof be adjudged, and for the payment to him of such sum as may, for any cause, be recovered against the plaintiff, the sheriff shall forthwith take the property described in the affidavit, if it be in the possession of the defendant or his agent, and retain it in his custody. He shall, also, without delay, serve on the defendant, a copy of the affidavit, notice and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion; with a notice in writing, that the sureties will justify before a judge of the court, or a county judge, at a time and place therein named; the time to be not less than four nor more than eight days thereafter.

§ 185. If the sureties do not justify, according to the notice, the sheriff shall forthwith deliver the property to the defendant. If they justify, he shall deliver it to the plaintiff, unless the defendant shall entitle himself thereto, as provided by the next two sections.

§ 186. At any time before the delivery of the property to the plaintiff, the defendant may require the return thereof, upon giving to the sheriff a written undertaking, executed by two or more sufficient sureties, to the effect that they are bound, in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum, as may, for any cause, be recovered against the defendant.

§ 187. The defendant's sureties, upon a notice to the plaintiff, of not less than four, nor more than eight days, shall justify before a judge, in the same manner as the sureties given by the plaintiff; and upon such justification, the sheriff shall deliver the property to the defendant.

§ 188. The qualifications of sureties, and their justification, shall be as are prescribed by sections 169 and 170, in respect to bail upon an order of arrest.

§ 189. If the property or any part thereof be concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it be not delivered, he shall cause the building or enclosure to be broken open, and take the property into his possession; and if necessary, he may call to his aid the power of his county.

§ 190. When the sheriff shall have taken property, as in this chapter provided, he shall keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking, and his necessary *expenses for keeping*, the same.

## CHAPTER III.

## INJUNCTION.

- SECTION 191. Writ of injunction abolished, and order substituted.  
 192. Injunction, in what cases granted.  
 193. When granted.  
 194. Notice, when required. Temporary injunction.  
 195. Security upon injunction.  
 196. Order to shew cause.  
 197. Security upon injunction to suspend business of corporation.  
 198, 199. Motion to vacate or modify injunction.

According to the present practice in cases of injunction, an order for it is first made, and then the writ issues. Both are not necessary. The command of the court may be communicated to the defendant by the order, as well as by the writ. We therefore abolished the writ, and retained the order.

We have defined the cases in which the injunction may be granted, and prescribed the practice respecting it.

§ 191. The writ of injunction as a provisional remedy is abolished; and an injunction, by order, is substituted therefor. The order may be made by the court in which the action is brought, or by a judge thereof, or by a county judge, in the cases provided in the next section; and when made by a judge may be enforced as the order of the court.

§ 192. Where it shall appear by the complaint, that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act of the defendant, the commission or continuance of which, during the litigation, would produce great or irreparable injury to the plaintiff; or where, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do, some act in violation of the plaintiff's rights, respecting the subject of the action,

and tending to render the judgment ineffectual, a temporary injunction may be granted, to restrain such act.

§ 193. The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the judge by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction.

§ 194. An injunction shall not be allowed, after the defendant shall have answered, unless upon notice, or upon an order to show cause; but in such case, the defendant may be restrained, until the decision of the judge, granting or refusing the injunction.

§ 195. Where no provision is made by statute, as to security upon an injunction, the judge shall require a written undertaking, on the part of the plaintiff, with or without sureties, to the effect that the plaintiff will pay to the party enjoined, such damages, not exceeding an amount to be specified, as he may sustain by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference, or otherwise, as the court shall direct.

§ 196. If the judge deem it proper that the defendant or any of several defendants, should be heard before granting the injunction, he may, by an order, require cause to be shown, at a specified time and place, why the injunction should not be granted; and he may in *the mean time*, restrain the defendant.

§ 197. An injunction to suspend the general and ordinary business of a corporation, shall not be granted, except by the court or a judge thereof. Nor shall it be granted, without due notice of the application therefor, to the proper officers of the corporation, unless the plaintiff shall give a written undertaking, executed by two sufficient sureties, to be approved by the court or judge, to the effect that the plaintiff will pay all damages, not exceeding the sum to be mentioned in the undertaking, which such corporation may sustain, by reason of the injunction, if the court shall finally decide that the plaintiff was not entitled thereto. The damages may be ascertained by a reference or otherwise, as the court shall direct.

§ 198. If the injunction be granted by a judge of the court or by a county judge, without notice, the defendant, at any time before the trial, may apply, upon notice, to a judge of the court in which the action is brought, to vacate or modify the same. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon affidavits on the part of the defendant, with or without the answer.

§ 199. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the injunction was granted.

## CHAPTER IV.

### OTHER PROVISIONAL REMEDIES.

SECTION 200. Powers of court, as to receivers, deposit of money, &c., in court, and other provisional remedies.

§ 200. Until the legislature shall otherwise provide, the court may appoint receivers, and direct the deposit of money or other thing in court, and grant the other provisional remedies now existing, according to the present practice, except as otherwise provided in this act.

There are several other provisional remedies, which we shall define and provide for in the completed code of procedure. It is not necessary to do so now, and we have therefore devoted our time to portions of the code more pressing.

## TITLE VIII.

### Of the Trial and Judgment, in Civil Actions.

#### CHAPTER I. JUDGMENT UPON FAILURE TO ANSWER.

##### II. ISSUES AND THE MODE OF TRIAL.

##### III. TRIAL BY JURY.

##### IV. TRIAL BY THE COURT.

##### V. TRIAL BY REFEREES.

##### VI. THE MANNER OF ENTERING JUDGMENT.

We have included trial and judgment in the same title, because they are so connected in some cases that it is difficult to separate them. Thus, in the case of trial by the court, the judgment of the court is given at the same time, upon both the facts and the law. To treat of the trial, in this instance, in one title, and the judgment in another, would needlessly *lengthen and involve* the provisions of the act.

The mode of trying issues of fact, is the first point to be determined. The instructions of the legislature, and our own judgment, lead us to seek uniformity. We have already provided an uniform mode of commencing actions, and an uniform mode of pleading. We think that there can also be an uniform mode of trial.

All that the constitution has prescribed on the subject, is contained in these two paragraphs :

“The trial by jury, in all cases in which it has been heretofore used, shall remain inviolate forever. But a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law.” (*Article 1, section 2.*)

“The testimony in equity cases shall be taken in like manner as in cases at law.” (*Article 6, section 10.*)

“The cases in which it has been heretofore used,” are all cases at common law, except that a reference might have been ordered, when the trial would require the examination of a long account. Therefore, in the old common law cases there are to be two modes of trial, one by jury as heretofore accustomed, the other by the referees, or the court, when the parties waive a trial by jury. Can the same mode be adopted in that class of cases heretofore determined by the courts of equity ?

A trial by the court or referees, is equally applicable to both classes of cases. Courts of equity have heretofore tried causes themselves, or with the aid of masters. It is true, that the testimony was in writing. But that appears to us an immaterial element in respect to this mode of trial, and if it were otherwise, the constitution has abolished it, and required the proofs to be taken orally, as often, and to the same extent, in equity as at law. Wherever, therefore, the parties waive a trial by jury, and a trial by the court or referees is to be had, there may be entire uniformity between cases legal and equitable.

The mode of doing this is naturally suggested by the other modes of trial. The practice which now prevails in equity, of writing down the testimony, word for word, and sending it all to the superior court on an appeal, must be discontinued. If it be not, the mere taking of the testimony, will occupy half the time of the judges. The rapid examination which takes place on common law trials before juries, leads to the truth, as surely as the slower process of other trials. A judge is as competent to estimate the weight of testimony as a juror, and can do it as rapidly. More time, or a more careful record of the testimony, is not necessary for him. Nor is it necessary for any purpose. In case of an appeal upon questions of fact, so much of the testimony as may be necessary to present the questions, may be stated in a case, as is now done in common law actions. We perceive no good reason why it should not be so.

Whenever the questions to be taken to the court above, are questions of law, they may be presented on bills of exceptions, or cases, made from the notes of counsel, under the direction of the judge, in this case, as well as that of a trial by jury. The court is substituted for the jury. The same machinery may be applied to the one mode of trial, which is now applied to the other. Bills of exceptions, cases, motions for new trials, on the ground of newly discovered evidence, will be equally appropriate, in both cases.

The point admitting of most debate is this, how far a determination of the facts by one court, on a trial had before it, without a jury, should be subject to revision. That it should be so to some extent, we cannot doubt. The power of determining the facts, vested in a single judge, without appeal, would be liable to abuse, and would be subject to great suspicion, whether abused or not. But how far this right of appeal upon the facts should be allowed, or whether it should be co-extensive with the right of appeal upon the law, or might be safely and justly limited to less, is a question of some moment. We are inclined to the limited appeal, because the issues of *fact are in general* not the most difficult, and an examination by

two courts creates as great a probability that justice has been done, as can ever attach to the verdicts of juries.

For the purpose of revision, we propose that a case be made, containing so much of the evidence as is material to the questions to be raised. The cases now made, at law, on motions for new trials, for insufficient evidence, are supposed to present and do in fact present the evidence correctly. It is not necessary to a proper judgment upon the facts, that the whole of every question and of every answer should be written down. A condensed statement of the evidence presents it as fairly, and, to the court more acceptably, because more easily examined.

There remains then but the case of a trial by jury. And the enquiry is narrowed down to this: can it be adopted in both classes of cases? Or in other words, where an uniform mode of pleading is used, will not the trial by jury be applicable as well to that class of cases heretofore denominated equitable, as to that denominated legal?

The contrary supposition implies, either that there is something in the nature of equitable cases, which unfits them for that mode of trial, or that the form of the pleadings is unsuited to it. We have already endeavored to show in the note to section 118, that the form of the pleadings in common law cases can be radically changed, and made uniform with those of equity, without in any degree impairing their fitness for jury trial. If we were right in that, then the obstacle, if there be any, is not in the form of the pleading, and the only remaining enquiry is, whether there be any thing in the nature of the cases distinguished as equitable, which unfits them for that mode of trial.

If there be, it must arise either from the nature or from the number and variety of the questions. It cannot be the former, because a jury can determine the questions of fact in one case, as well as the other. Is it then the latter? It is, we know, objected frequently and earnestly, that the number and variety of the questions of fact in equity cases, make it inexpedient, if not impossible, to submit them properly to a jury at a single trial.

The objection assumes that the number of questions of fact presented by an equity case is greater, than the number of questions in a case at law. Is this true however, and if it be true, is the difference so great as to make a different mode of trial necessary? We have taken pains to make a comparison and think we are warranted in saying that the average number of real issues of fact, is not greater in equitable than in legal cases.

If it were, however, considerably greater, that would not be decisive, unless it could be shown, that it was greater than could be conveniently disposed of by a jury, or greater than a jury is ever required to dispose of in a common law case. This however cannot be shown, for we know that common law suits sometimes present a score or more of issues joined, and that each issue may and does often really involve several questions of fact.

Then it is said, that in equity cases there are many parties, standing in different relations to each other, while in cases at law the parties are few, and all the plaintiffs stand in the same relation to all the defendants. They who make this an objection forget, that by our present law, a plaintiff may sue in one action all the parties to commercial paper, however different may be their defences, and however various their relations to each other. The holder of a protested bill of exchange may prosecute together all the drawers, acceptors and endorsers, and one jury shall try all the issues. Can more than this happen in an equitable case?

We think, therefore, we are warranted in concluding, that there is nothing in the nature of the questions, nor in the number and variety of them, which should prevent a uniform mode of trial in all cases, whether they be such as have been heretofore denominated legal or equitable.

The next point for consideration is, how, in respect of form, the questions should be submitted to the jury. Should they be left at large upon the complaint, answer, and reply, under the *instructions of the court*, or should they be reduced beforehand,

to the form of particular and detached issues ? Either mode may be adopted. Our own preference is for the former. We think that there is no necessity for stating the questions before the trial, further than they appear in the complaint, answer and reply. It cannot be necessary to do so for the information of the parties, or their counsel. They know what questions are in dispute, from an examination of the pleadings. The same is true of the court. And all that the jury need, is to have the questions plainly stated, when the case is given to them. This is now done by the judge in summing up ; and to him we would leave it.

But we would authorize him, to direct the jury in certain cases, where the questions may be complicated, to find a special verdict in writing, upon all or any of the issues ; or, if they render a general verdict, to find upon particular questions of fact, stated in writing. This will have a tendency to give greater precision to the language of the judge, enable the jury the better to separate the questions, and prevent mistake and misunderstanding.

Sometimes it may happen, perhaps, that the wrong issues, or immaterial ones, are put to the jury. But that often happens now, in the trial of cases at law, upon the strictest issues, of which common law pleadings are capable. The books are full of cases of new trials granted, because the judge had put the cause to the jury upon some wrong or immaterial question. And if it so happens in ordinary cases, as now conducted, it cannot be considered a serious objection, that the same thing, though less frequently, may happen in a trial upon pleadings reformed as we propose. We make no scruple in saying, that the new pleadings will be exposed to it in a much less degree, for the reason, that the parties will be better acquainted beforehand, with the really disputable points, and therefore more able to prepare for, and point out to the court and the jury, those which are, and those which are not, disputed.

## CHAPTER I.

## JUDGMENT UPON FAILURE TO ANSWER.

SECTION 201. Judgment, what.

202. Judgment, on failure of defendant to answer.

§ 201. A judgment is the final determination of the rights of the parties, in the action.

To avoid the confusion incident to the use of the word judgment, in two senses, one as interlocutory, and the other as final, we have thought it better to use it only in the latter sense, and to designate all other written directions of a court or judge, as orders.

§ 202. Judgment may be had, if the defendant fail to answer the complaint, as follows:

1. In any action arising on contract, for the recovery of money only, the plaintiff may file with the clerk, the summons and complaint, with proof of service, and that no answer has been received. The clerk shall thereupon enter judgment for the amount mentioned in the summons.

2. In other actions, the plaintiff may, upon the like proof, apply to the court, at the time and place specified in the summons, for the relief demanded in the complaint. If the taking of an account or the proof of any fact be necessary to enable the court to give judgment, or to carry the judgment into effect, the court, instead of taking the account or hearing the proof, may in its discretion, order a reference for that purpose to any person, *free from all exception*, to be named by the plaintiff.

And where the action is for the recovery of money only, the court, if the plaintiff require it, shall order the damages to be assessed by a jury, or if the examination of a long account be involved, by a reference as above provided.

## CHAPTER II.

### ISSUES, AND THE MODE OF TRIAL.

SECTION 203. The different kinds of issues.

204. Issue of law.

205. Issue of fact.

206. On issues both of law and fact, the issue of law to be first tried.

207. Trial, what.

208. Issue of fact to be tried by jury, unless waived or reference ordered.

209. Other issues to be tried by court.

210. All issues to be tried before a single judge.

211. Either party may give notice of trial; note of issue.

212. Order of disposing of issues on the calendar.

§ 203. Issues arise upon the pleadings, when a fact or conclusion of law is maintained by the one party and controverted by the other. They are of two kinds :

1. Of law ; and
2. Of fact.

§ 204. An issue of law, arises,

1. Upon a demurrer to the complaint: or
2. Upon an allegation of fact in a pleading, by the one party, the truth of which is not controverted by the other.

§ 205. An issue of fact arises,

1. Upon a material allegation in the complaint controverted by the answer ; or

2. Upon new matter in the answer controverted by the reply ; or,

3. Upon new matter in the reply.

§ 206. Issues both of law and of fact may arise upon the pleadings in the same action. In such case, the issues of law must be first tried, unless the court otherwise direct.

§ 207. A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact.

The word trial is here used, in its true and original signification, as applicable both to questions of fact and of law, though in common parlance, it is used in this state in a more restricted sense, and applied only to the first. The old definition is thus given in the first Institute, 124.

“ Trial is to find out by due examination the truth of the point in issue, or question between the parties whereupon judgment may be given. And as the question between the parties is two-fold, so is the trial thereof : for either it is *questio juris*, (and that shall be tried by the judges either upon a demurrer, special verdict, or exception, for *cui libet in sua arte perito est credendum ; et quod quisque norit in hoc se exerceat* ; and it is commonly and truly said, *ad questionem juris non respondent juratores*,) or it is *questio facti*.”

As one word is desirable, for both kinds of judicial examination, we have thought it best to employ this, in its proper acceptance.

§ 208. Whenever, in an action for the recovery of money only, or of specific real or personal property, there shall be an issue of fact, it must be tried by a jury, unless a jury trial be waived, as provided in section 221, or

a reference be ordered, as provided in sections 225 and 226.

As we have already mentioned, in the note to the title, there are three kinds of trial of an issue of fact; a trial by jury, trial by the court, and trial by referees. A trial by jury is secured, by the constitution, to the parties, if they require it, where there are issues of fact in the courts of law, excepting only those where the trial involves the examination of a long account. We propose an extension of the right of trial by jury to many cases, not within the constitutional provision.

§ 209. Every other issue is triable by the court, which, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury; or may refer it, as provided in sections 225 and 226.

§ 210. All issues, whether of law or fact, triable by a jury or by the court, shall be tried before a single judge. Issues in the supreme court, shall be tried at the circuit courts.

Issues of law and fact in equity cases, have heretofore, been tried before a single judge. Issues of fact, in common law cases, have also been tried before a single judge, while the issues of law have been tried before three judges. To produce uniformity in the mode of trial, we propose, that all issues shall be tried in the first instance before a single judge, whether they be issues of fact or of law. By this arrangement, we are enabled to give two appeals, in cases originating in the supreme court, one from the special term or circuit, to the general term, and the other from the general term to the court of appeals. And we can see no inconvenience to arise, either to the suitors or the court, from such an arrangement, although it may not be quite consonant with the present habits of the profession.

The same practice should of course be adopted in the superior court and common pleas of New-York. There ought to be no difference between the courts in that respect.

§ 211. At any time after issue, and at least ten days before the court, either party may give notice of trial. The party giving the notice shall furnish the clerk, at least four days before the court, with a note of the issue, containing the title of the action, the names of the attorneys, and the time when the last pleading was served; and the clerk shall thereupon enter the cause upon the calendar, according to the date of the issue.

§ 212. The issues on the calendar shall be disposed of in the following order; unless, for the convenience of parties, or the despatch of business, the court shall otherwise direct:

1. Issues of fact, to be tried by a jury;
2. Issues of fact, to be tried by the court;
3. Issues of law.

The issues to be tried by a jury should be first disposed of, that the jury may be relieved from their attendance at court, as soon as possible.

## CHAPTER III.

### TRIAL BY JURY.

**SECTION 213.** Either party may bring issue to trial.

214. Plaintiff to furnish court with copy summons, &c.

215. General and special verdicts, what.

216. When jury may render either general or special verdict, and when court may direct special finding.

217. On special finding and general verdict, former to control.

218. Jury to assess damages and when.

219. Entry of the verdict.

220. Judgment to be given immediately, unless, &c.

§ 213. Either party giving the notice may bring the issue to trial, and in the absence of the adverse party, unless the court, for good cause, otherwise direct, may proceed with his case, and take a dismissal of the complaint, or a verdict or judgment, as the case may require.

§ 214. The plaintiff shall furnish the court with a copy of the summons and pleadings, with the offer of the defendant, if any shall have been made.

§ 215. The verdict of a jury is either general or special. A general verdict, is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury find the facts only, leaving the judgment to the court.

§ 216. In every action for the recovery of money only, or specific real or personal property, the jury, in the

discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; or may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes.

§ 217. Where a special finding of facts shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

§ 218. When a verdict shall be found for the plaintiff, in an action for the recovery of money only, the jury shall also assess the amount of the recovery.

§ 219. Upon receiving a verdict, the court shall direct an entry to be made, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment to be rendered thereon, or an order that the case be reserved for argument or further consideration.

§ 220. Judgment shall be entered by the clerk, in conformity to the verdict, after the expiration of four days, unless the court order the case to be reserved for  
ment or further consideration.

## CHAPTER IV.

### TRIAL BY THE COURT.

**SECTION 221.** Trial by jury how waived.

222. On trial by court, judgment to be given in twenty days.

223. Exceptions, &c., how taken.

224. On judgment upon issue of law, how to proceed.

§ 221. Trial by jury may be waived by the several parties, to an issue of fact in the manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent in open court, entered in the minutes.

This section is intended to provide the means, by which the parties may avail themselves of the constitutional permission, that "a jury trial may be waived by the parties in all civil cases, in the manner to be prescribed by law."

We are inclined to think, that parties will frequently avail themselves of this permission; and that under our system of an elective judiciary, trial by the court will become more and more popular. There are a great many cases, which the parties will prefer submitting to the judgment of the court, particularly where the question is one resting upon documentary evidence, or in which the chief controversy is upon questions of law. Cases respecting title to land, in which the trial must necessarily involve the examination of abstruse questions in the law of real property, cases of insurance, or concerning commercial paper, or requiring the consideration of foreign law, will often be of this character. In that limited class of actions, in which the parties have been heretofore permitted to choose, between trial by the court and a trial by the jury, the former has been the more commonly chosen. Such has been found to be the case, we believe, in justices' courts. In the marine court in the city of

New-York, as appears from a return made to the convention, the number of judgments entered in 1845, was 1285, while the number of jury trials was only 67; and in 1846, up to the 27th of June, the number of judgments was 544, while the jury trials were only 27.

The late act of the English parliament, for the establishment of county courts gives the parties in civil suits the choice of a trial by jury or by the court. We see it reported, that in one of the metropolitan courts under that act, there have been 3000 cases tried, in which applications for juries have been made in only *three* cases.

One of the most burthensome duties of the citizen, is the performance of jury service. If that burthen can be lessened, by the plan proposed, without in any way infringing upon the rights of parties, we shall regard it as a great benefit.

§ 222. Upon a trial of a question of fact by the court, its decision shall be given in writing, and filed with the clerk, within twenty days after the court at which the trial took place. In giving the decision, the facts found shall be first stated, and then the conclusion of law upon them. Judgment upon the decision shall be entered accordingly.

§ 223. Either party may except to a decision on a matter of law arising upon such trial, within ten days after notice thereof, in the same manner, and with the same effect, as upon a trial by jury. And either party desiring a review upon the evidence appearing on trial, either of the questions of fact or of law, may, at any time within ten days after notice of the judgment, make a case containing so much of the evidence as may be *material to the question to be raised.*

**The case shall be settled according to the existing practice.**

§ 224. On a judgment for the plaintiff upon an issue of law, the plaintiff may proceed in the same manner as upon the failure of the defendant to answer, as prescribed by section 202. If judgment be for the defendant, upon an issue of law, and the taking of an account or the proof of any fact be necessary to enable the court to complete the judgment, a reference may be ordered as in that section provided.

## CHAPTER V.

### TRIAL BY REFEREES.

SECTION 225. Reference of all issues by consent.

226. Compulsory reference.

227. Report to stand as decision of the court upon a trial.

228. Referees, how chosen out of the city of New-York.

229. How chosen in the city of New-York.

§ 225. All or any of the issues in the action, whether of fact or of law, or both, may be referred, upon the written consent of the parties.

This will give the parties the advantages of an arbitration, without any of its risks, it being provided by section 159, that the report of the referees shall stand as the decision of the court, and the right of appeal be secured. It will also operate to relieve the courts, by enabling parties to choose judges of their own, whose decisions will have the effect of judgments.

§ 226. Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. Where the trial of an issue of fact shall require the examination of a long account on either side; in which case, the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or,

2. Where the taking of an account shall be necessary for the information of the court, before judgment, or for carrying a judgment or order into effect; or,

3. Where a question of fact, other than upon the pleadings, shall arise, upon motion or otherwise, in any stage of the action.

§ 227. The report of the referees upon the whole issue, shall stand as the decision of the court, in the same manner as if the action had been tried by the court; and their decision upon the matter referred, may be excepted to and reviewed in like manner.

§ 228. In all cases of reference, the parties may agree upon a suitable person or persons, not exceeding three; and on filing such agreement, the reference shall be ordered accordingly. If the parties do not agree, the court shall (except in the city and county of New-York,) appoint one or more referees, not exceeding three, who shall be free from exception, and reside in the county where the action is triable.

§ 229. In the city and county of New-York, when the parties do not otherwise agree, there shall be three referees, who shall be free from exception and reside in

that city. They shall be appointed as follows: Each party shall name one, and these two shall name the third. If they fail to do so within two days after their own appointment, the name of the third referee shall be drawn by the clerk from the jury box, in the manner to be directed by the court, on ordering the reference. If either party omit to name a referee, his place shall be supplied from the jury box, in the same manner.

The power given to the courts of appointing referees, has already, in the city of New-York, given rise to great embarrassment. Judicial patronage, by this means, has become greater than has ever before been known among us, and should not be allowed to continue. We have devised the best means we could, of putting an end to it absolutely. If the effect shall be to induce parties to agree generally upon the referee, as we hope will be the case, we shall esteem it an opportune provision.

The evils of the appointments by the judges not having been felt, as we understand, out of the city, and there being no complaint on the subject, known to us, we have left the provisions of the judiciary act to stand as they are, in that respect.

## CHAPTER VI.

## MANNER OF ENTERING JUDGMENT.

SECTION 230. Judgment for or against any plaintiff or defendant.

231. What relief plaintiff to have.

232. Damages, what recoverable.

233. Judgment to be given and entered before a single judge.

234. The clerk to keep a judgment book.

235. Judgment to be entered in judgment book.

236. Judgment roll, what to contain.

237. Judgment to be docketted.

§ 230. Judgment may be given, for or against one or more of several plaintiffs, and for or against one or more of several defendants, and it may determine the ultimate rights of the parties on each side, as between themselves.

The object of this section, is to prevent a failure of justice, when there happen to be too many or too few parties brought into court. The questions arising on the nonjoinder or misjoinder of parties, are the cause of much delay, vexation and disappointment, resulting, not unfrequently, in an entire failure of justice. This section will prevent them hereafter. It is also designed to save the necessity of a second action between parties, on the same side, where their liability over to each other, depends on the result of the issue joined with their common adversary. As for instance, if a recovery be had against the makers and endorsers of a promissory note, in one action, the latter would be entitled, in the same action, to a judgment against the makers, or to be subrogated in the place of the plaintiff, on paying his recovery.

§ 231. The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint; but in any other case, the *court may grant him any relief consistent with the*

**case made by the complaint, and embraced within the issue.**

It will be recollected that the plaintiff is required to state, in his complaint, the relief to which he supposes himself entitled. It will sometimes happen, that he mistakes that relief; if he do so, and the defendant do not appear, judgment ought to be given for that only, which the plaintiff has demanded. If both parties appear, and the whole controversy be gone into, there seems to be no reason, why the plaintiff should not have the relief to which he is entitled, though he may have mistaken it in his complaint.

**§ 232. Whenever damages are recoverable, the plaintiff may claim and recover, if he shew himself entitled thereto, any rate of damages, which he might have heretofore recovered for the same cause of action.**

It now happens, that the rate of damages recoverable in an action, depends in part upon the form of the action. The form being abolished, it should seem to follow, that the plaintiff ought to be enabled to recover any amount which he might have heretofore recovered, in any form of action that he could have selected. To prevent uncertainty on this head, we have thought it best to declare the rule explicitly.

**§ 233. Judgment upon an issue of law or of fact, or upon confession, or upon failure to answer, (except where the clerk is authorized to enter the same by the first subdivision of section 202, and by section 337,) shall, in the first instance, be entered upon the direction of a single judge, subject to review at the general term, on the demand of either party, as herein provided.**

reason applies to the judgment.

**§ 234. The clerk shall keep among the records of the**

court a book for the entry of judgments, to be called the "judgment book."

§ 235. The judgment shall be entered in the judgment book, and shall specify clearly the relief granted, or other determination of the action.

§ 236. The clerk, immediately after entering the judgment, shall attach together and file the following papers, which shall constitute the judgment roll.

1. In case the complaint be not answered, the summons and complaint, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, and a copy of the judgment, with any verdict or report, the offer of the defendant, case, exceptions, and all orders relating to a change of parties, or in any way involving the merits, and necessarily affecting the judgment.

§ 237. On filing a judgment roll, upon a judgment directing in whole or in part the payment of money, it may be docketed with the clerk of the county, where it was rendered, and in any other county upon filing with the clerk thereof, a transcript of the original docket; and shall be a lien on real property in the county from the time of docketing the judgment therein.

## **TITLE IX.**

### **Of the execution of the judgment in Civil Actions.**

#### **CHAPTER I. THE EXECUTION.**

##### **II. PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.**

### **CHAPTER I.**

#### **THE EXECUTION.**

- SECTION 238.** Certain judgments may be enforced by execution.
239. After five years to be issued only by leave of court.
240. Other judgments how enforced.
241. Three kinds of execution; need not be sealed.
242. To what counties may be issued.
243. Against the person, in what cases, and when.
244. Contents of execution.
245. To be returned in sixty days.
246. Existing laws relating to executions, continued until otherwise provided.

A revision of the forms of execution now in use, under the various forms of action and modes of procedure, is the necessary result of the abrogation of those forms, and the union of law and equity practice in a common system.

In accomplishing this, we have aimed at retaining every necessary and useful feature of final process, and nothing more. The execution is a direction to the sheriff, to execute the judgment of the court, and should inform him what that judgment is, the place where it is to be found, the time from which it is a lien, the names of the parties, and whether it is to be executed on the property or the person of the debtor.

In accordance, as we believe, with the opinion and wishes of those best informed on the subject, we dispense with the delay of thirty days after judgment, and allow the execution to be issued immediately. By the existing law, if an execution have been issued within two years, another may be issued after any lapse of time within twenty years ; but if that formality have been omit-

ted, and two years suffered to elapse, the dilatory and expensive proceeding by scire facias, must be resorted to in order to obtain execution. We propose to extend the time to five years, without regard to an execution issued within that period, and after that to substitute for the scire facias, the more simple and summary proceedings of a motion.

§ 238. Writs of execution for the enforcement of judgments as now used, are modified in conformity to this title, and the party in whose favor judgment is given, may at any time within five years after the entry of judgment, proceed to enforce the same as prescribed by this title.

§ 239. After the lapse of five years from the entry of judgment, an execution may be issued only by leave of the court on motion, with notice to the adverse party. Such leave shall not be given unless it be established by the oath of the party or other proof that the judgment or some part thereof remains unsatisfied and due.

§ 240. Where a judgment requires the payment of money or the delivery of real or personal property, the same may be enforced in those respects by execution, as provided in this title. Where it requires the performance of any other act, a certified copy of the judgment may be served upon the party against whom it is given, and his obedience thereto required. If he refuse, he may be punished by the court as for a contempt.

§ 241. There shall be three kinds of execution; one against the property of the judgment debtor; another *against his person*; and the third for the delivery of the

possession of real or personal property. They shall be deemed the process of the court, but they need not be sealed nor subscribed, except as prescribed in section 244.

§ 242. Where the execution is against the property of the judgment debtor, it may be issued to the sheriff of any county where the judgment is docketed. Where it requires the delivery of real or personal property, it must be issued to the sheriff of the county where the property, or some part thereof is situated. Executions may be issued, at the same time, to different counties.

§ 243. If the action be one in which the defendant might have been arrested, as provided in section 151, an execution against the person of the judgment debtor may be issued to any county within the jurisdiction of the court after the return of an execution against his property, unsatisfied in whole or in part.

§ 244. The execution must be directed to the sheriff, subscribed by the party issuing it or his attorney, and must intelligibly refer to the judgment; stating the court, the county where the judgment roll is filed, the names of the parties, the amount of the judgment if it be for money, and the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the sheriff substantially as follows:

1. If it be against the property of the judgment debtor, it shall require the sheriff to satisfy the judgment out of the personal property of such debtor, or if suffi-

cient cannot be found, then out of the real property belonging to him on the day when the judgment was docketed in the county ; or at any time thereafter,

2. If it be against the person of the judgment debtor, it shall require the sheriff to arrest such debtor, and commit him to the jail of the county, until he shall pay the judgment, or be discharged according to law ;

3. If it be for the delivery of the possession of real or personal property, it shall require the sheriff to deliver the possession of the same (particularly describing it) to the party entitled thereto.

§ 245. The sheriff shall, in all cases return the execution within sixty days after its receipt to the clerk with whom the record of judgment is filed.

§ 246. Until otherwise provided by the legislature, the existing provisions of law relating to executions, and their incidents, including the sale and redemption of property, the powers and rights of officers, their duties thereon, and the proceedings to enforce those duties and the liability of their sureties, shall apply to the executions prescribed by this chapter.

## CHAPTER II.

### PROCEEDINGS SUPPLEMENTARY TO THE EXECUTION.

**SECTION 247.** If execution be returned unsatisfied, an order for discovery of property allowed.

248. Any debtor may pay an execution against his creditor.

249. Order for examination of debtor.

250. Witnesses may be examined.

251. Party or witness must be examined in the county.

252. Judge may order property to be applied.

253. May appoint a receiver.

254. Adverse claims to property to be tried by action.

255. Judge may order reference.

256. May allow costs to a party or witness.

257. Disobedience to be punished as contempt.

The provisions of this chapter, are designed to furnish a cheaper and easier method of discovering the concealed property of a judgment debtor, and of applying it, including outstanding claims in his favor, or things in action to the satisfaction of the judgment. It is a substitute for the existing remedy by creditors bill.

The great expense and formality attending this mode of enforcing payment of a judgment, has been one of the worst evils of our judiciary system. We entertain not the slightest doubt, that in practice this will be found much more easy and expeditious, and much less expensive than the present system.

The several sections require no explanation.

§ 247. When an execution against property of the judgment debtor, issued to the sheriff of the county where he resides, or if he reside out of the state, to the sheriff of the county where the judgment roll is filed, shall be returned unsatisfied in whole or in part, the judgment creditor may obtain an order from a judge of the court or a county judge of the county to which the execution was issued, requiring the judgment debtor to appear and make discovery on oath, concerning his property,

before such judge at a time and place specified in the order.

§ 248. After the issuing of execution against property, any person indebted to the judgment debtor, may pay to the sheriff the amount of his debt, or so much thereof as shall be necessary to satisfy the execution, and the sheriff's receipt shall be a sufficient discharge therefor.

§ 249. Upon an affidavit, that any person has property of the judgment debtor, or is indebted to him, the judge may by an order require such person to appear at a specified time and place, and be examined, concerning the same.

§ 250. Witnesses may be required to appear and testify on any proceedings under this chapter, in the same manner as upon the trial of an issue.

§ 251. If the party or witness reside in the county where the order is made, he shall be required to attend before the judge; if in any other county, before a referee, as provided in section 255. In such case the examination shall be taken by the referee, and certified to the judge.

§ 252. The judge may order any property of the judgment debtor, not exempt from execution, in the hands either of himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the *judgment*.

§ 253. The judge may also, by order, appoint a receiver of the property of the judgment debtor, in the same manner, and with the like authority, as if the appointment were made by the court, according to section 200. The judge may also, by order, forbid a transfer of the property of the judgment debtor, and any interference therewith.

§ 254. If it appear that a person so brought before the judge, claims an interest in the property of the judgment debtor, adverse to him, such interest shall be recoverable only in an action by the receiver; but the judge may by order, forbid a transfer or other disposition of such interest, till a sufficient opportunity be given to the receiver to commence the action.

§ 255. The judge may, in his discretion, order a reference to a referee agreed upon or appointed as prescribed in sections 228 and 229, to report the evidence or the facts.

§ 256. The judge may allow to the judgment creditor or to any party or witness so examined, his traveling expenses, and a fixed sum in addition, not exceeding thirty dollars as costs.

§ 257. If any party or witness disobey an order of the judge, duly served, such party or witness may be punished by the judge, as for a contempt.

## TITLE X.

### Of the Costs in civil Actions.

- SECTION 253.** Fee bill abolished. Specific allowances given, termed costs.
259. When allowed of course to plaintiff.
260. When to defendant.
261. When in discretion of court.
262. Amount allowed.
- 263, 264. Allowance, in addition, of a per centage on the recovery or claim.
265. Interest on verdict or report added as part of costs.
266. Clerk to insert costs in judgment.
267. Clerk's fees.
268. Referees' fees.
269. Postponement of trial, amount payable thereon.
270. No costs on motion.

On this subject we have proposed radical changes. We propose to abolish the fee bill altogether, cut off at once this prolific source of complaint and abuses, and place the law on its proper footing, of indemnity to the party, whom an unjust adversary has forced into litigation.

Costs seem, at present, to be fixed with a view to the three following principles : first, that the state should prescribe the compensation which a lawyer may receive for his services ; second, that this compensation should be proportioned to the number and length of proceedings in a cause ; and, third, that the whole of it should be assessed upon the losing party. The two first we conceive to be unsound.

We cannot perceive the right of the state, to interfere between citizens, and fix the compensation which one of them shall receive from the other, for his skill or labor. Government is instituted for the preservation of order, and the protection of rights. It is not its province, to make bargains for the people or to regulate prices. This it assumes to do, in respect to the

dealings between lawyer and client. It fixes the price of skill and labor. It has no more just right to do this, than it has to fix the price of property. It may prescribe the salary of the clergyman, or the fee of the physician, with as much reason as the compensation of the attorney. If it be said, that the attorney is an officer, admitted by the courts, and therefore, in a position different from the others, we answer, that he is not a public officer, chosen to perform public duties. He is admitted to practice in the courts, for private purposes, and on behalf of private persons. He is, in every respect, a private agent, and the only rightful supervision that the state may have over him, more than it has over every citizen, is, to see that he does not abuse his license. Freedom of industry, is one of the strongest demands of the time. This includes, not only the right of the citizen to engage, at will, in any honest calling, but to receive such reward as he can agree for it.

If the right to prescribe the compensation were conceded, it should never be made to depend, upon the number or length of the proceedings. This it did formerly, in all cases, and although of late years there has been a tendency to adopt specific charges, there are still many cases, where the fees are graduated by the length and number of the papers. The system is wrong, for two reasons; one, that it encourages the multiplication of the processes, and the other, that it is not proportioned to the real labor performed.

So long as the compensation is adjusted as at present, according to a minute table of fees, no matter how nicely the table may be prepared, there will yet remain opportunities for unnecessary papers, and unnecessary motions. No device which the wit of man ever conceived, can shut the door upon such opportunities. And although the number of those who abuse them is not great, yet it cannot be denied, that there are unworthy persons who do so. To get rid of such persons, is the wish of the profession, no less than of the public; and that cannot be done, without the abolition of the system altogether.

The real labor bestowed upon a lawsuit, is proportioned, not so much to the number or length of proceedings in the courts, as to the difficulty of the questions of law or fact. One case requires little thought; and almost takes care of itself; another requires a vast amount of study, careful preparation, and great learning. These cannot be measured by any table of fees. A just rate of compensation depends on the service performed, the manner in which it is performed, and the situation of the parties. One performs the service well, another does it ill : they should not both have the same compensation. Then the residence of the parties is an element in the compensation. A fair compensation, in a county, where the means of subsistence are cheap, would be wholly inadequate in a county where they are dear. In some counties, a lawyer gives fifty dollars for the rent of his office, and five hundred for his personal expenses. In others, his rent and his personal expenses are quadrupled. There is no justice in providing that he shall receive the same compensation in both places.

The only just rule on the subject, in respect to the lawyer, is the same, as in respect to every other professional person; that is, to enforce the contracts made by him. Let him make his engagement with his client, as they can agree between themselves, or if there be no express agreement, let the rate of compensation be determined by the usage in such cases. No other rule is consonant either with justice, or the prevailing spirit of this age.

The losing party, ought however, as a general rule, to pay the expense of the litigation. He has caused a loss to his adversary unjustly, and should indemnify him for it. The debtor who refuses to pay, ought to make the creditor whole.

To satisfy these different principles, it is necessary, while the relations between the client and the lawyer are left free so that they may make whatever contract they please, that there shall be provided some mode of indemnifying the successful party for his expenses in the suit. Then how shall the *amount of indemnity* be regulated? It cannot be adjusted with

precision, from the nature of the case, but we can get an approximation to it. There are two modes; one by letting the court or the jury fix it, in each particular case, according to its circumstances; the other by giving certain allowances, graduated in part by the necessary labor performed, and in part by the amount in controversy. The latter strikes us as preferable, because it leaves nothing to arbitrary discretion.

We shall thus provide an indemnity approaching, in a degree, the amount which the client will have to pay to his attorney and counsel. Their compensation will depend generally upon the difficulty of the case, and the amount at risk. A commission upon the amount will cover the last, and the specific charges will, in a considerable degree, cover the first. We have not designated the sums to be inserted in the act, preferring that it should be done by the legislature. They will readily perceive, that the amount concerns the client only, and not the lawyer, for the compensation of the latter will be entirely independent of it.

These provisions, we believe, will put the law of costs on its true foundation, leaving the lawyer and the client to agree upon the compensation, between themselves, according to their views of the necessity and value of the service, and giving to the prevailing and the innocent party, an indemnity as nearly exact as it can be made, depending, not on the number of the motions, or the length of the papers, but on the risk and the labor. The reward of the lawyer will then depend, as it ought, on the responsibility he assumes, the skill he can employ, and the time he gives to his client.

It is far from our intention to say, that the indemnity thus provided, will prove, in all cases, adequate. It will sometimes be less than the amount paid by the client, sometimes it may be more. It will certainly be an approximation to it, much greater than our present system of costs, while it does not violate the first principles of political economy, and, will put away forever from the profession, the temptation and the scandal of the present system.

§ 258. All statutes, establishing or regulating the costs or fees of attorneys, solicitors and counsel in civil actions, and all existing rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor or counsel, for his compensation, are repealed ; and hereafter the measure of such compensation shall be left to the agreement, express or implied of the parties. But there may be allowed to the prevailing party, upon the judgment, certain sums by way of indemnity, for his expenses in the action ; which allowances are, in this act termed costs.

§ 259. Costs shall be allowed of course to the plaintiff upon a recovery, in the following cases :

1. In an action for the recovery of real property, or when a claim of title to real property arises on the pleadings, or is certified by the court to have come in question at the trial.
2. In an action to recover the possession of personal property.
3. In the actions, of which according to section 47, a court of a justice of the peace has no jurisdiction.
4. In an action for the recovery of money, where the plaintiff shall recover fifty dollars or more.

§ 260. Costs shall be allowed of course to the defendant, in the actions mentioned in the last section, unless the plaintiff be entitled to costs therein.

§ 261. In other actions, costs may be allowed or not *in the discretion of the court.*

§ 262. When allowed, ~~the~~ costs shall be as follows :

1. To the plaintiff, for all proceedings before notice of trial (including judgment when entered,)

In an action where judgment upon failure to answer may be had without application to the court, seven dollars; in an action where judgment can only be taken on application to the court, twelve dollars; for all subsequent proceeding before trial, seven dollars:

2. To the defendant; for all the proceedings before notice of trial, five dollars; for all subsequent proceedings before trial, seven dollars:

3. For the trial of issues of law, if separate from the trial of issues of fact, to the plaintiff, fifteen dollars; to the defendant, twelve dollars:

4. For the trial of the issues of fact, if separate from the trial of the issues of law, to the plaintiff, fifteen dollars; to the defendant, twelve dollars:

5. For the trial of the issues of fact and of law, when tried at the same time, to the plaintiff, twenty dollars; to the defendant, fifteen dollars:

6. To either party on appeal, excepting to the court of appeals; before argument, fifteen dollars; for argument, thirty dollars:

7. To either party on appeal to the court of appeals; before argument, twenty dollars; for argument, fifty dollars:

8. To either party, for every circuit or term, at which the cause is necessarily on the calendar, and not reached or postponed, excluding that at which it is tried or heard ten dollars.

§ 263. In addition to these allowances, if the action be for the recovery of money, or of real or personal property, and a trial have been had, the court may in its discretion, in difficult or extraordinary cases, make an allowance of not more than ten per cent. on the recovery or claim, as in the next section prescribed, for any amount not exceeding five hundred dollars; and not more than five per cent. for any additional amount.

§ 264. These rates shall be estimated as follows:

1. If the plaintiff recover judgment, it shall be upon the amount of money, or the value of the property, recovered.
2. If the defendant recover judgment, it shall be upon the amount of money, or the value of the property, claimed by the plaintiff.

Where the action is for real or personal property, the value thereof must be determined by the jury, court or referees, by whom the action is tried.

§ 265. When the judgment is for the recovery of money, interest from the time of the verdict or report, until judgment be finally entered, shall be computed by the clerk, and added to the costs of the party entitled thereto.

By the act of 1844, chapter 324, interest is allowed on all judgments, and after verdict or report, and before final judgment, are to be taxed as costs.

§ 266. The clerk shall insert in the entry of judgment on the application of the prevailing party, upon two days' notice to the other, the sum of the charges for costs, as above provided, and the necessary disbursements, allowed by law, including the compensation of referees, and the expense of printing the papers upon any appeal. The disbursements shall be stated in detail, and verified by affidavit, which shall be filed.

§ 267. The clerk shall receive,

On every trial, from the party bringing it on, one dollar;

On entering judgment, one dollar.

He shall receive no other fee, for any service whatever in a civil action, except for copies of papers, at the rate of five cents for every hundred words.

In addition to the above charges, the clerk of the superior court of the city of New-York, and the clerk of the court of common pleas of the city and county of New-York, shall receive, for the use of the city of New-York, to the credit of the fund for the payment of those clerks, one dollar for the entry of every judgment, in place of the fees now charged for services of the judges of those courts, at chambers.

§ 268. The fees of referees shall be three dollars to each, for every day spent in the business of the reference; but the parties may agree in writing upon any other rate of compensation.

§ 269. When an application shall be made to a court or referees, to postpone a trial, the payment to the adverse party of a sum not exceeding ten dollars, besides the fees of witnesses, may be imposed, as the condition of granting the postponement.

§ 270. No costs shall be allowed on a motion, except the costs of resisting in the discretion of the court, not exceeding ten dollars.

## **TITLE XI.**

### **Of appeals in civil actions.**

#### **CHAPTER I. APPEALS IN GENERAL.**

##### **II. APPEALS TO THE COURT OF APPEALS.**

##### **III. APPEALS TO THE SUPREME COURT, FROM AN INFERIOR COURT.**

##### **IV. APPEALS IN THE SUPREME COURT, AND THE SUPERIOR COURT AND COURT OF COMMON PLEAS OF THE CITY OF NEW-YORK, FROM A SINGLE JUDGE, TO THE GENERAL TERM.**

##### **V. APPEALS TO THE SUPERIOR COURT OF THE CITY OF NEW-YORK, OR TO A COUNTY COURT, FROM AN INFERIOR COURT.**

## **CHAPTER I.**

### **APPEALS IN GENERAL.**

#### **SECTION 271. Writs of error abolished.**

272. Orders made out of court, how reviewed.

273. Any party aggrieved may appeal.

274. Parties how designated on appeal.

275. Appeals made by serving and filing notice with clerk.

276. Clerk to transmit papers to appellate court.

277. Intermediate orders affecting the judgment, may be reviewed on the appeal.

278. What judgment may be given.

279. Certain appeals to be within two years.

280. Other appeals within ten days.

281. Appellant to furnish papers to the court.

While the court of chancery had a separate existence, the review of its decision by the court of last resort, was accomplished by means of a proceeding, styled an appeal, and that of the supreme court, was reviewed by the same court, upon a proceeding, styled a writ of error. Under the new constitution, the court of appeals succeeds to the court for the correction of errors, and the present supreme court inherits the jurisdiction of the old chancery and supreme court. By the ju-

diciary act of 1847, for the organization of the new judiciary, the double system of review, by appeal and writ of error, was continued and made applicable to the new courts. The circumstances of the case, however, warrant us in believing, that it was adopted as a temporary measure, until time could be taken for a thorough revision of the whole system of appeals. That duty we have endeavored to perform in this title, in connection with the provisions continued in the first part, relating to the courts and their jurisdiction. We have substituted a uniform system of appeals, in all actions, varying only according to the jurisdiction of the courts and their peculiar organization. The security required on appeal has been adapted to the nature of the judgment appealed from, in analogy to that heretofore provided in the court of chancery.

§ 271. Writs of error and appeals in civil actions, as they have heretofore existed, are abolished, and the only mode of reviewing a judgment, or order, in a civil action, shall be that prescribed by this title.

§ 272. An order, made out of court, without notice to the adverse party, may be vacated or modified, without notice, by the judge, who made it, or may be vacated or modified on notice, in the manner in which other motions are made.

§ 273. Any party aggrieved may appeal in the cases prescribed in this title.

§ 274. The party appealing, shall be known as the appellant, and the adverse party as the respondent. But the title of the action shall not be changed, in consequence of the appeal.

§ 275. An appeal must be made by the service of a notice in writing, on the adverse party, and on the clerk, with whom the judgment or order appealed from is entered, stating the appeal from the same or some specified part thereof.

§ 276. Upon the appeal, allowed by the second and third chapters of this title, being perfected, the clerk with whom the notice of appeal is filed, shall, at the expense of the appellant, forthwith transmit to the appellate court a certified copy of the notice of appeal and of the judgment roll.

§ 277. Upon an appeal from a judgment, the court may review any intermediate order, involving the merits, and necessarily affecting the judgment.

§ 278. Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and may, if necessary or proper, order a new trial.

§ 279. The appeal allowed by the second and third chapters of this title, must be taken within two years after the judgment.

§ 280. The appeal allowed by the fourth chapter of this title, must be taken, within ten days, after written notice of the judgment or order shall have been given to the party appealing.

§ 281. The appellant shall furnish the court with copies, of the notice of appeal, and of the order or judgment roll. If he fail to do so, the appeal shall be dismissed, unless the court shall otherwise direct.

## CHAPTER II.

### APPEALS TO THE COURT OF APPEALS.

SECTION 282. Appeal in what cases taken.

283. Security must be given to pay costs and damages.

284. If judgment for money, security to stay execution.

285. If to deliver documents, they must be deposited.

286. If to execute conveyance, it must be deposited.

287. If to deliver property, security for, also on mortgage sale,

288. Security given, proceedings stayed.

289. Undertakings in one instrument or several.

290. Security to be approved, and to justify.

291. Perishable property may be sold.

292. Undertaking be filed.

§ 282. An appeal may be taken to the court of appeals, in the cases mentioned in section 11.

§ 283. To render an appeal effectual for any purpose, a written undertaking must be executed, on the part of the appellant, by at least two sureties, to the effect, that the appellant will pay all costs and damages, which may be awarded against him on the appeal, not exceeding two hundred and fifty dollars; or that sum must be deposited with the clerk, with whom the judgment or order was entered, to abide the event of the appeal. Such undertaking or deposit may be waived by a written consent on the part of the respondent.

and those following relating to securities on appeals, are taken substantially from the Revised Statutes, with such modifications, however, both in language and effect, as to make them conformable to our general plan. 2. R. S. 606-8.

§ 284. If the appeal be from a judgment directing the payment of money, it shall not stay the execution of the judgment, unless a written undertaking be executed on the part of the appellant, by at least two sureties, to the effect, that if the judgment appealed from, or any part thereof, be affirmed, the appellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant, upon the appeal.

§ 285. If the judgment appealed from, direct the assignment or delivery of documents, or personal property, the execution of the judgment shall not be stayed by appeal, unless the things required to be assigned or delivered, be brought into court, or placed in the custody of such officer or receiver as the court shall appoint, or unless an undertaking be entered into, on the part of the appellant, by at least two sureties, and in such amount as the court shall direct, to the effect that the appellant will obey the order of the appellate court, upon the appeal.

§ 286. If the judgment appealed from, direct the execution of a conveyance or other instrument, the execution of the judgment shall not be stayed by the appeal, until the instrument shall have been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court.

§ 287. If the judgment appealed from, direct the sale or delivery of possession of real property. the execution of the same shall not be stayed, unless a written undertaking be executed on the part of the appellant, with two sureties, to the effect that during the possession of such property by the appellant, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment be affirmed, he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof, pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered, and which shall be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking shall also provide for the payment of such deficiency.

§ 288. Whenever an appeal shall be perfected, as provided by sections 284, 285, 286 and 287, it shall stay all further proceedings in the court below, upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed, upon any other matter included in the action, and not affected by the judgment appealed from.

§ 289. The undertakings prescribed by sections 283, 284, 285, and 287, may be in one instrument or several, at the option of the appellant.

§ 290. An undertaking upon an appeal shall be of no effect, unless it be approved in the first instance by a judge of the court below, or a county judge. The respondent may, however, except to the sufficiency of the sureties, within ten days after notice of the appeal; and sureties justify, before a judge of the court below or a county judge, as prescribed by sections 170 and 171, within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification shall be upon a notice of not less than five days.

ist have the same qualifications as bail, pursuant

§ 291. In the cases not provided for in sections 284, 285, 286, 287 and 288, the perfecting of an appeal, by giving the undertaking mentioned in section 283, shall stay proceedings in the court below, upon the judgment appealed from, except, that where it directs the sale of perishable property, the court below may order the property to be sold, and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court.

§ 292. The undertaking must be filed with the clerk, with whom the judgment or order appealed from was entered.

## CHAPTER III.

### APPEALS TO THE SUPREME COURT FROM AN INFERIOR COURT.

SECTION 293. Appeal, in what cases.

294. Security to be given as on appeal to courts of appeals.

295. Where heard.

296. Papers, by whom furnished.

§ 293. An appeal may be taken to the supreme court, from the judgment rendered by a county court, or by the mayors' court of either of the cities of Albany, Hudson, Troy and Rochester, or by the recorders' court of either of the cities of Buffalo and Utica.

§ 294. Security must be given upon such appeal, in the same manner, and to the same extent, as upon an appeal to the court of appeals.

§ 295. Appeals in the supreme court shall be heard at a general term, either in the district embracing the county where the judgment or order appealed from was entered, or in a county adjoining that county, except that where the judgment or order was entered in the city and county of New-York, the appeal shall be heard in the first district.

By the existing law, an appeal can only be heard in the county where the venue is laid, or in an adjoining county. The same act requires a general term of the supreme court to be held in every county, or an adjoining county, every year.

These provisions are inapplicable to the organization of the courts, and the times and places of holding them, as proposed by us in the first part of this work. The times when and counties in which the general terms are to be held in each district are by our plan to be appointed by the Governor.

It is not less important to the parties in litigation and the public, that justice should be administered speedily than to have it "brought home to every man's door." Parties would often choose to go a little further for it, or at least have their counsel go, when there is only a question of law to be settled on appeal, than to wait too long to have justice come to the door. We therefore propose to allow appeals to be heard anywhere in the district, or in a county adjoining that in which the cause was tried, though in another district.

§ 296. When the appeal is heard in a county other than that where the judgment roll is filed, the judgment upon the appeal shall be certified to the clerk with whom the roll is filed, to be there entered and docketed.

## CHAPTER IV.

### APPEALS IN THE SUPREME COURT, AND THE SUPERIOR COURT AND COURT OF COMMON PLEAS OF THE CITY OF NEW-YORK, FROM A SINGLE JUDGE, TO THE GENERAL TERM.

SECTION 297. Appeals allowed from circuits and special terms to same court in general term; where heard, and security required.

298. Decision on facts at general term final.

299. Orders in certain cases may be appealed from.

300. Orders at chambers to be entered before appeal.

§ 297. In the supreme court, the superior court of the city of New-York, and the court of common pleas for the city and county of New-York, an appeal, upon either the law or the fact, may be taken to the general term, from a judgment entered upon the direction of a single judge of the same court. Security must be given upon such appeal, in the same manner as upon an appeal to the court of appeals. In the supreme court, the appeal shall be heard in the same manner as if it were an appeal from an inferior court.

§ 298. Upon such appeal, the decision upon the facts shall be final.

§ 299. An appeal may in like manner, and within the same time, be taken from an order made by a single judge of the same court, and may be thereupon reviewed, in the following cases:

1. When the order grants or refuses a provisional remedy.

2. When it involves the merit of the action, or some part thereof.

But no appeal, under this section shall be taken, unless a judge of the same court certify that in his opinion, it is proper, that the question arising on the appeal should be decided before the judgment.

§ 300. The last section shall include an order made out of court upon notice; but in such case, the order must be first entered with the clerk. And for the purpose of an appeal, any party, affected by such order, may require it to be entered with the clerk, and it shall be entered accordingly.

## CHAPTER V.

APPEAL TO THE SUPERIOR COURT OF THE CITY OF NEW-YORK,  
OR TO A COUNTY COURT, FROM AN INFERIOR COURT.

SECTION 301. Existing laws for review of judgments repealed, and this chapter substituted.

302. Judgments to be reviewed by superior court, and by county courts.

303. Appellant to make affidavit.

304. Copy affidavit and notice of appeal to be served.

305. Security to stay execution.

306. To be approved by judge or court below.

307. Order to stay, and security how served.

308. In case of death of justice, to be filed.

309. Counter affidavits allowed.

310. Appeal may be heard on affidavits.

311. Return when and how made, and compelled.

312. In case justice be out of office.

313. Amended return may be required.

314. If justice be dead witnesses to be examined.

315. Hearing, upon return.

316. Copies of papers not required on hearing.

317. Judgment how given.

318. Judgment roll.

319. If new trial ordered, reason to be given.

320. New trial where had.

321. Costs to whom awarded.

322. Restitution may be ordered.

323. Costs set off in certain cases.

324. What costs allowed.

By the terms of the constitution, jurisdiction is expressly given to the county courts in cases arising in justices' courts. The existing system of appeals from justices' judgments, when over twenty-five dollars, and of certiorari when under that amount, is very defective as a system of review, and very expensive in practice. The amount of recovery is by no means a criterion of the amount involved in the controversy, or of the importance of the error complained of; as great injustice may arise by the failure to obtain a judgment over twenty-five dollars, in a good cause of action, for a large sum, as in a recovery for that amount, when a less sum was due. Nor does there appear to be any well founded reason for affording a new trial, as the remedy in one case, and a mere hearing on questions of law only in the other.

When the judgment is for an amount over twenty-five dollars, a new trial is now granted on an application by one party without notice to the other; and the trial must have been conducted with uncommon ability, if there can be no ground found by a skilful practitioner, on which to obtain an allowance of an appeal. Indeed the instances of refusing an appeal are very rare, and it has become almost a matter of course to grant it on the representation of the attorney. An allowance of an appeal is equivalent to an order for a new trial in the county court; a trial which, in the majority of cases, costs twice as much as the amount in controversy.

When parties have once submitted their differences to the decision of a court, a new trial ought never to be granted, unless it be made to appear that some material error by the court has occurred, by which the substantial rights of the party have been prejudiced; and before it is allowed, or the matter is considered, a notice to the opposite party, and an opportunity for a full and fair hearing on both sides, should be afforded. The system devised and recommended for adoption is based on on this principle.

It is proposed to abolish both the certiorari and appeal, in the form in which they now exist, and to substitute in all cases an appeal by an application to the appellate court for a new trial or reversal, founded on an affidavit, setting forth the grounds of the appeal. A copy of this affidavit is to be served on the adverse party, with notice of the application. On hearing both sides, if there is no discrepancy in the affidavits as to the matters complained of, the court orders a new trial, or reverses or affirms the judgment on the first hearing, as the case may require. In case of disagreement in the affidavits as to the material facts, it orders a return. The order and affidavits on both sides are sent to the court below, which makes a return; and on that, the matter is finally heard and determined.

This is a summary outline of the system, which is made applicable to all the inferior courts; and it is confidently believed *that it will afford a cheap, summary, and yet safe method of*

reviewing judgments in justices' courts, and other inferior tribunals.

§ 301. All statutes, now in force, providing for the review of judgments in civil cases, rendered by courts of justices of the peace, by the marine court of the city of New-York, by the assistant justices' courts in the city of New-York, by the municipal court of the city of Brooklyn, and by the justices' courts of the cities of Albany, Troy and Hudson, and regulating the practice in relation to such review, are repealed; and hereafter, the only mode of reviewing such judgments shall be an appeal, as prescribed by this chapter.

§ 302. When the judgment shall have been rendered by the marine court of the city of New-York, or by an assistant justice's court in that city, the appeal shall be to the superior court of the city of New-York; and when rendered by any of the other courts enumerated in the last section, to the county court of the county where the judgment was rendered.

§ 303. The appellant shall, within twenty days after the judgment, make, or cause to be made, an affidavit, stating the substance of the testimony and proceedings before the court below, and the grounds upon which the appeal is founded.

§ 304. A copy of the affidavit shall, within the same time, be served on the respondent, if he be a resident of the

city or county, or if he be not a resident, on the attorney or agent, if any, who appeared for him on the trial, or on the justice; with a notice, stating that the appellant appeals from the judgment, and that the appeal will be heard by the appellate court, at a time and place therein designated, either in or out of term; which copy and notice shall be served at least ten days before the time for hearing the appeal.

§ 305. If the appellant desire a stay of execution of the judgment, he shall present the affidavit to a judge of the appellate court, or a justice of the supreme court, who may, thereupon, in his discretion, make an order that all proceedings on the judgment be stayed, upon security being given, as provided in the next section.

§ 306. The security shall be a written undertaking, executed by one or more sufficient sureties, approved by the judge making the order, or by the court below, to the effect that if judgment be rendered against the appellant, and execution thereon be returned unsatisfied, in whole or in part, the sureties will pay the amount unsatisfied.

§ 307. The delivery of the order and undertaking to the court below, shall stay the issuing of execution; or if it have been issued, the service of a copy of the order and undertaking, certified by the court below, upon the officer holding the execution, with payment of his fees, shall stay further proceedings thereon.

§ 308. Where, by reason of the death of a justice of the peace, or his removal from the county, or any other cause, the order to stay and the undertaking on the appeal cannot be delivered to him, they shall be filed with the clerk of the appellate court, and notice thereof given to the respondent. They shall, thereupon, have the same effect as if delivered to the justice.

§ 309. When the affidavit and notice of appeal shall have been served, the respondent may supply or correct material omissions or mis-statements therein, by an affidavit on his part; a copy of which shall be served on the attorney, if any, who prosecutes the appeal, or if there be none, on the appellant, or on the attorney or agent, if any, who appeared for him on the trial, at least four days before the time for hearing the appeal.

§ 310. The appellate court shall proceed to hear the appeal, at a time and place mentioned in the notice, or to which the hearing may be adjourned, or at such other time as the court shall appoint, of which at least ten days notice shall be given, and may decide the same upon the affidavits; or if they be contradictory or defective in material points, may order the court below to make a return of the testimony and proceedings before it, within ten days after the service of the order and affidavits, or of copies thereof.

§ 311. The court below shall, thereupon, within the time limited by the order, make a return to the appellate court, of the testimony, proceedings and judgment, and file the same, with the order and affidavits, in the appel-

late court; and may be compelled to do so by attachment. But no justice of the peace shall be bound to make a return, unless the fee prescribed by the last section of this chapter, be paid on service of the order.

§ 312. When a justice of the peace, by whom a judgment appealed from was rendered, shall have gone out of office, before a return is ordered, he shall, nevertheless, make a return, in the same manner, and with the like effect, as if he were still in office.

§ 313. If the return be defective, the appellate court may direct a further or amended return, as often as may be necessary, and may compel a compliance with its order, by attachment.

§ 314. If a justice of the peace, whose judgment is appealed from, shall die, become insane, or remove from the state, the appellate court may examine witnesses, on oath, to the facts and circumstances of the trial or judgment, and determine the appeal, as if the facts had been returned by the justice. If he shall have removed to another county within the state, the appellate court may compel him to make the return, as if he were still within the county where the judgment was rendered.

§ 315. If a return be made, the appeal may be brought to a hearing at a general term of the appellate court, upon a notice by either party, of not less than eight days. It shall be placed upon the calendar, and con-

time thereon, without further notice, until finally disposed of; but if neither party bring it to a hearing, before the end of the second term, the court shall dismiss the appeal, unless it continue the same, by special order, for cause shown.

§ 316. The appeal, whether heard on the affidavits or return, shall be heard on the original papers; and no copy thereof need be furnished for the use of the court.

§ 317. Upon the hearing of the appeal, either upon affidavits or upon the return, the appellate court shall give judgment according to the justice of the case, without regard to technical errors or defects, which do not affect the merits. In giving judgment, the court may either order a new trial, or may affirm or reverse the judgment of the court below, in whole or in part, and as to any or all the parties.

§ 318. To every judgment upon an appeal, there shall be annexed the affidavits or return on which it was heard, which shall be filed with the clerk of the court, and shall constitute the judgment roll.

§ 319. If a new trial be ordered, a concise statement of the reasons for such order shall be filed with the clerk. The court below shall thereupon proceed to try the action upon the issue originally joined therein, or upon amended pleadings, in its discretion; and for that purpose, on the application of either party, may issue a summons directed to the other party, to appear for such new trial, at a time and place to be designated therein; the time to be not less than six days from the service of the summons. And the trial may be adjourned from time to

time, not exceeding ninety days in all, in the same manner and on the same terms as a second or further adjournment may now be granted by courts of justices of the peace, or to procure the issuing and return of a commission to take testimony, and the trial and all subsequent proceedings shall be had therein and conducted in like manner in all respects as in an action originally commenced before the same justice.

§ 320. If a new trial be ordered, on an appeal from a judgment of a justice of the peace, it shall be before the same justice, or before any other justice in the same county, in the discretion of the appellate court.

§ 321. If the judgment be affirmed, costs shall be awarded to the respondent. If it be reversed, costs shall be awarded to the appellant, unless a new trial be ordered; in which case, they shall be in the discretion of the appellate court. If it be affirmed in part, the costs, or such part as to the court shall seem just, may be awarded to either party.

§ 322. If the judgment below, or any part thereof, be collected, and the judgment be afterwards reversed, the appellate court shall order the amount collected to be restored, with interest from the time of collection. The order may be obtained upon proof of the facts made at or after the hearing, upon a previous notice of six days.

§ 323. If, upon an appeal, a recovery be had by one party, and costs be awarded to the other, the appellate court shall set off the one against the other, and render judgment for the balance.

§ 324. The following fees and costs, and no other, shall be allowed on the appeals mentioned in this chapter:

To the appellant, on reversal, if upon affidavit, ten dollars; if upon a return, fifteen dollars:

To the respondent, on affirmance, if upon affidavit, seven dollars; if upon a return, twelve dollars:

To a justice of the peace, for his return, one dollar.

If the judgment appealed from be reversed in part, and affirmed as to the residue, the amount of costs allowed to either party, shall be such sum as the appellate court may award, not exceeding ten dollars.

If the appeal be dismissed for want of prosecution, as provided by section 315, no costs shall be allowed to either party.

## **TITLE XII.**

### **Of the miscellaneous proceedings, in civil actions, and general provisions.**

#### **CHAPTER I. SUBMITTING A CONTROVERSY, WITHOUT ACTION.**

- II. PROCEEDINGS AGAINST JOINT DEBTORS, HEIRS, LEGATEES  
DEVISEES, AND TENANTS HOLDING UNDER A JUDGMENT  
DEBTOR.**
- III. CONFESSION OF JUDGMENT WITHOUT ACTION.**
- IV. OFFERS OF THE DEFENDANT, TO COMPROMISE THE WHOLE  
OR A PART OF THE ACTION.**
- V. ADMISSION OR INSPECTION OF WRITINGS.**
- VI. EXAMINATION OF PARTIES.**
- VII. EXAMINATION OF WITNESSES.**
- VIII. MOTIONS AND ORDERS.**
- IX. ENTITLING AFFIDAVITS.**
- X. COMPUTATION OF TIME.**
- XI. NOTICES, AND FILING AND SERVICE OF PAPERS.**
- XII. DUTIES OF SHERIFFS AND CORONERS.**
- XIII. ACCOUNTABILITY OF GUARDIANS.**
- XIV. POWERS OF REFEREES.**
- XV. GENERAL PROVISIONS.**

## **CHAPTER I.**

### **SUBMITTING A CONTROVERSY, WITHOUT ACTION.**

**SECTION 325.** Parties may submit controversy without action.

326. Judgment on, same as in other cases, but without costs.

327. Judgment may be enforced, or appealed from, as in an action.

§ 325. Parties to a question in difference, which might be the subject of a civil action, may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same, to any court which would have jurisdiction, if an action had been brought. But it must appear by affidavit, that the controversy is real, and the *proceeding in good faith*, to determine the rights of the

parties. The court shall thereupon hear and determine the case, at a general term, and render judgment thereon, as if an action were depending.

This provision, it is believed, will be useful in many cases, where a question, as to a legal right, exists between fair and honorable men, there being no dispute about the facts. A final determination of such a case may be obtained in this way, not only quicker and cheaper, but in a manner more congenial to the feelings of the parties, than by an ordinary action at law; the latter being a process to bring an unwilling defendant to submit himself to the arbitrament of the laws.

§ 326 Judgment shall be entered in the judgment book, as in other cases, but without costs. The case, the submission, and a copy of the judgment shall constitute the judgment roll.

§ 327. The judgment may be enforced in the same manner, as if it had been rendered in an action, and shall be subject to appeal in like manner.

## CHAPTER II.

### PROCEEDINGS AGAINST JOINT DEBTORS, HEIRS, DEVISEES, LEGATEES AND TENANTS, HOLDING UNDER A JUDGMENT DEBTOR.

**SECTION 328.** Parties not summoned in an action on joint contract, may be summoned after judgment.

329. If judgment debtor die, his representatives may be summoned.

330. Contents of summons.

331. Affidavit of amount due required.

332. Party summoned may defend by answer.

333. Reply and trial as in other actions.

334. Reply and answer to be verified.

In another part of the act, actions upon judgments between the same parties are forbidden.

When a right of action exists against several joint contractors, it is often convenient and sometimes necessary, to proceed with the action and take judgment, though a part only of the defendants, could be found to be served with the summons or process for commencing the action. In such case, it may happen, that the plaintiff is unable to obtain satisfaction, out of any joint property of all the defendants, or the individual property of the party actually served, and it may be necessary to proceed against the other joint contractor, who, from temporary absence or other cause, was not served with process in the first instance, and yet has property sufficient to satisfy the judgment.

To give the plaintiff an adequate remedy, and yet prevent the abuse alluded to, we allow a proceeding to be instituted on the first judgment, to make it effectual against all the joint contractors; but in order to induce the plaintiff to use proper diligence, to include all the defendants in the first action, we allow him no costs on the subsequent proceeding, and also permit the defendants thus brought in, to set up any defence they might have made in the original action. As the law now

stands, in an action on the judgment, they could only defend themselves on the ground of not being joint contractors, the first judgment being conclusive against them, on all other matters.

In the remaining part of this chapter, relating to executors, heirs, &c., we have changed the form of proceeding, to correspond with that in regard to joint debtors, so as to make it more easy and expeditious, than the old proceeding by *scire facias*, but have made no change in the policy of the law, except that costs are not given.

§ 328. When a judgment shall be recovered against one or more of several persons, jointly indebted upon a contract, by proceeding as provided in section 115, those who were not originally summoned to answer the complaint, may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned.

§ 329. In case of the death of a judgment debtor after judgment, the personal representatives, heirs, devisees, or legatees of the judgment debtor, or the tenants of real property, owned by him and affected by the judgment, may be summoned to show cause, why the judgment should not be enforced, against the estate of the judgment debtor in their hands respectively.

§ 330. The summons, provided in the last two sections, shall be subscribed by the judgment creditor, his representatives, or attorney; shall describe the judgment, and require the person summoned, to show cause, within twenty days after the service of the summons;

and shall be served in like manner as the original summons.

§ 331. The summons shall be accompanied by an affidavit of the person subscribing it, that the judgment has not been satisfied, to his knowledge, <sup>or</sup> information ~~and~~ belief, and shall specify the amount due thereon.

§ 332. Upon such summons, the party summoned may answer within the time specified therein, denying the judgment, or setting up any defence which may have arisen subsequently; and in addition thereto, if he be proceeded against according to section 328, he may make the same defence, which he might have originally made to the action.

§ 333. The party issuing the summons, may reply to the answer, and the issue thereon may be tried and judgment given, in the same manner, as in an action.

§ 334. The answer and reply shall be verified in like manner, and be subject to the same rules, as the answer and reply in an action.

### CHAPTER III.

#### CONFESSION OF JUDGMENT, WITHOUT ACTION.

SECTION 335. Judgment on debt, or liability authorized.

336. Statement, and what it must contain.

337. To be filed, and clerk to enter judgment.

A simple and summary mode of taking judgment by confession, without suit, is provided in this chapter. Judgments by confession, are a common mode of securing endorsers and sureties, when there is no real debt, and only a contingent lia-

bility. Without prohibiting this kind of security, it is deemed expedient, in order to prevent the abuse of it, to require, in all cases, a statement of the true grounds and consideration of the judgment, to be made and sworn to, and to have this a part of the judgment roll, so that its purpose and intent cannot be denied or concealed.

Not only are judgments by confession perverted to fraudulent ends, under the existing laws, but the form of confessing the judgment is an idle ceremony. By it, a party designing to confess judgment in a court of record, executes a formal power of attorney, drawn up according to approved precedent, by which he gives general authority to an attorney of any court, to appear for him, receive a declaration, and put in a plea of confession. On the strength of this, an attorney draws up a declaration, as if there were a real action, an appearance of the defendant, and a formal plea to the action, confessing judgment. This he takes to some other attorney, who signs the appearance and plea, by virtue of the general power. Another copy of the pretended declaration is then made, and a copy of the plea, and the formal words of a judgment record, are added. This is taken to a judge, who goes through the ceremony of signing his name in the margin; the costs, though fixed by statute, are, nevertheless, duly taxed, and then the pleadings, and all the papers in the pretended suit, are carefully filed in the judicial archives.

§ 335. A judgment by confession may be entered, without action, either for money due or to become due, or to secure any person, against contingent liability on behalf of the defendant, or both, in the manner prescribed by this chapter.

§ 336. A statement in writing must be made, signed by the defendant and verified by his oath, to the following effect :

1. It must state the amount, for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it be for money due or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed therefor is justly due, or to become due.

3. If it be for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show, that the sum confessed therefor does not exceed the same.

§ 337. The statement may be filed with a county clerk; who shall endorse upon it, and enter in the judgment book, a judgment of the supreme court for the amount confessed, with five dollars costs. The statement and affidavit with the judgment endorsed, shall thereupon become the judgment roll.

## CHAPTER IV.

### OFFERS OF THE DEFENDANT, TO COMPROMISE THE WHOLE OR A PART OF THE ACTION.

SECTION 338. Defendant may serve offer to compromise and the proceedings thereon.

339. Defendant may offer to liquidate damages conditionally.

340. If plaintiff accept or refuse, the effect thereof.

In a previous part of the act, we have required the plaintiff in an action, arising on contract for the recovery of money only, to specify in his summons, the amount for which he will take judgment if the defendant fail to answer. In a case where the plaintiff has a just claim to a certain amount, which the defendant is not disposed to controvert, the specification in the summons enables the defendant to know, whether that is all the plaintiff seeks, and if so, he may, with perfect

safety, permit judgment by default, as the law limits the recovery, in that case, to the amount specified. On the other hand, where the plaintiff has a conceded good cause of action, for a certain amount, but claims a larger sum than the defendant is disposed to admit, and also where the defendant disputes the whole claim, but is willing to concede something, by way of compromise, rather than litigate, he may, under the provisions of this chapter, offer to permit judgment against him for such sum, as he deems just, or is willing to give for peace; and if the plaintiff does not accept it, but carries on the action, in order to recover a greater amount, he does it at the hazard of paying costs to the defendant, if he shall fail to establish a greater claim.

This provision holds out inducements to both parties, to make fair offers to each other, for the purpose of avoiding a law suit, and makes it their interest to employ safe counsel, who will not advise a prosecution, or defence, without good cause. The same desire to avoid unnecessary litigation, and promote conciliation between parties, that is manifested in the constitution, in authorizing courts of conciliation, will doubtless prompt the legislature to adopt these conciliatory rules, in conducting actions before the ordinary tribunals.

These remarks have particular application to the first section of the chapter; but are also appropriate, to some extent, to the two latter sections. In regard to these, however, the principal benefit hoped from them, is to save the time of courts and witnesses, and the expense to parties, in proving the amount of damages, in case the right to recover in the action, shall be established.

§ 338. In an action arising on contract, the defendant may, at any time before trial or judgment, serve upon the plaintiff, an offer in writing to allow judgment, to be taken against him, for the sum, or to the effect therein specified. If the plaintiff accept the offer, and

give notice thereof, within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the clerk shall thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer shall be deemed withdrawn, and shall not be given in evidence; and if the plaintiff fail to obtain a more favorable judgment, he shall pay the defendant's costs, from the time of the offer.

§ 339. In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that, if he fail in his defence, the damages be assessed at a specified sum; and if the plaintiff signify his acceptance thereof in writing, with or before the notice of trial, and on the trial have a verdict, the damages shall be assessed accordingly.

§ 340. If the plaintiff do not accept the offer, he shall prove his damages, as if it had not been made, and shall not be permitted to give it in evidence. And if the damages assessed in his favor shall not exceed the sum mentioned in the offer, the defendant shall recover his expenses, incurred in consequence of any necessary preparation or defence in respect to the question of damages. Such expenses shall be ascertained at the trial.

## CHAPTER V.

## ADMISSION OR INSPECTION OF WRITINGS.

**SECTION 341.** A party may be required to admit a paper to be genuine, or pay expense of proving it.

**342.** A party may demand inspection and copy of a paper.

The provisions of this chapter are in harmony with the whole spirit of our design; which is, to get at the facts in a legal controversy, by the shortest possible way, and that at the expense of parties, rather than of witnesses.

The first section is taken, with some modification, from a practice recommended by the English Law Commissioners.

The second, provides for obtaining, in a summary manner, an inspection and copy of papers in the hands of the adverse party.

§ 341. Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper, material to the action, and request an admission in writing of its genuineness. If the adverse party or his attorney fail to give the admission, within four days after the request, and if the party, exhibiting the paper, be afterwards put to expense in order to prove its genuineness, and the same be finally proved or admitted on the trial, such expense, to be ascertained at the trial, shall be paid by the party refusing the admission; unless it appear to the satisfaction of the court, that there were good reasons for the refusal.

§ 342. The court before which an action is pending, or a judge or justice thereof, may in their discretion, and

upon due notice, order either party to give to the other, within a specified time, an inspection and copy, or permission to take a copy, of a paper in his possession, or under his control, containing evidence relating to the merits of the action, or the defence therein. If compliance with the order be refused, the court, on motion, may exclude the paper from being given in evidence, or punish the party refusing, or both.

## CHAPTER VI.

### EXAMINATION OF PARTIES.

SECTION 343. Abolishes the action for discovery.

344. A party may call his adversary as a witness.

345. Such examination allowed before trial.

346. Party may be compelled to attend.

347. Rebutting testimony of party.

348. If he refuse, may be punished as for contempt.

349. Testimony by a party not responsive to the inquiries, may be rebutted by the oath of the party calling him.

350. Persons for whom action is brought or defended.

§ 343. No action to obtain discovery under oath, in aid of the prosecution or defence of another action, shall be allowed, nor shall any examination of a party be had, on behalf of the adverse party, except in the manner prescribed by this chapter.

§ 344. A party to an action may be examined as a witness, at the instance of the adverse party, or of any one of several adverse parties, and for that purpose may be compelled, in the same manner, and subject to the same rules of examination, as any other witness, to testify, either at the trial, or conditionally, or upon commission.

§ 345. The examination, instead of being had as provided in the last section, may be had, at any time be-

fore the trial, at the option of the party claiming it, before a judge of the court or a county judge, on a previous notice to the party to be examined, and any other adverse party, of at least five days, unless, for good cause shown, the judge order otherwise. But the party to be examined, shall not be compelled to attend in any other county than that of his residence, or where he may be served with a summons for his attendance.

§ 346. The party to be examined, as in the last section provided, may be compelled to attend, in the same manner as a witness who is to be examined conditionally; and the examination shall be taken and filed in like manner, and may be read by either party on the trial.

§ 348. The examination of the party, ~~the party~~, may be rebutted by adverse testimony.

§ 347. If a party refuse to attend and testify as in the last three sections provided, besides being punished himself as for a contempt, his complaint, answer or reply may be rejected.

§ 349. A party examined by an adverse party, as in this chapter provided, may be examined, on his own behalf, in respect to any matter pertinent to the issue. But if he testify to any new matter, not responsive to the enquiries put to him by the adverse party, such adverse party may offer himself as a witness on his own behalf, in respect to the new matter, and shall be so received.

§ 350. A person for whose immediate benefit the action is prosecuted or defended, though not a party to the action, may be examined as a witness, in the same manner, and subject to the same rules of examination, as if he were named as a party.

The provisions contained in this chapter, we have considered so important to the success of our system, that from the first we have contemplated their introduction. Meantime the legislature, at their late session, have passed an act upon the subject. That act however, contemplates the examination at the trial only. We think it important to extend it so as to permit the examination to take place before the trial, at the option of the party.

Before the act of the last session, whenever a party sought a discovery from his adversary, he was obliged to file a bill in equity, called a bill of discovery. The proceeding was dilatory and expensive. If the examination be had at all, it may be had in the same action as well as in another. That it should be had in some form, our law has always admitted. The difficulty was, that the process to obtain it, was oppressive, and often ineffectual.

Two modes of examination have been proposed, one oral and the other upon written interrogatories. The latter is the method of the civil law. We think the question is decided, by the act of December, and if it were not, we should still prefer the oral examination. A written deposition taken in private, is not the best means of eliciting the truth; nor do we see, why the law should be so tender of the consciences of parties, when it is so hard with the consciences of witnesses. These are brought into court, are made to waste their time about a matter not their own, and, when called to the stand, are subjected to the most searching and often offensive examination. Why should he, who has brought them there, be exempted from the same scrutiny?

One of the great benefits, to be expected from the examination of the parties, is the relief it will afford, to the rest of the

community, in exempting them, to a considerable degree, from attendance as witnesses, to prove facts, which the parties respectively know, and ought never to dispute, and would not dispute, if they were put to their oaths. To effect this object, it should seem necessary, to permit the examination beforehand, that the admission of the party may save the necessity of a witness. But if the examination be once had, we would not permit it to be repeated, else it might become the means of annoyance.

When a party has called his adversary to be sworn as a witness, the testimony ought to be deemed evidence in the cause, in the same manner, as the deposition of any other witness, and if the examining party will not use it, the party examined should be permitted to do so.

A doubt has arisen under the law of the last session whether the party, called by his adversary, to testify upon a single point, may be examined on his own behalf, as to all the points in the cause. We think it the true construction of the act, that he may, and that if the construction were otherwise, the law should be changed. The principle upon which we would regulate the matter is this, that if a party make a witness of his adversary, he should be regarded, as another witness would be regarded. If a witness be produced, though but to a single point, he is made, by the production, a general witness in the cause. So we think it is, and should be, with a party made witness.

It would not be safe, to limit the evidence, to the precise enquiry of the examining party, as that might do the party examined injustice; for instance, if he should be asked whether he had borrowed money of the plaintiff, he might be obliged to answer, that he had, but it would be unjust, to require him to answer that question, and prohibit him from testifying to the further fact, that he had afterwards paid it. Where, also, there are several causes of action prosecuted together, if a party be called by his opponent, to testify as to one, he becomes a witness for himself as to all. To remove this difficulty, and with a view also to encourage the examination of parties, we pro-

pose to allow the examining party to controvert, by his own oath, any testimony which the other may give, not responsive to the questions put to him. It is but just, that if the party examined, go beyond the point, to which he is examined by his adversary, his testimony shall not go uncontradicted, by the party who called him. The tendency of our age, is to look for the truth wherever it may be found. Let us not fear, that judges and juries will be deluded into a belief of an improbable or untrue story, though the parties themselves be the persons who utter it.

## CHAPTER VII.

### EXAMINATION OF WITNESSES.

SECTION 351. No witness to be excluded by reason of interest.

352. Nor by reason of sentence for felony.

353. Witness not obliged to attend out of his county.

354. } Proceedings to examine witness out of his county.

355. }  
356. Witness disobeying order may be punished as for contempt.

§ 351. No person offered as a witness, shall be excluded, by reason of his interest in the event of the action. ~~But this section shall not apply to a party to the~~

§ 352. The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, nor to any assignor of a thing in action assigned for the purpose of making him a witness.

The abrogation of the rule, which excludes a witness, who has an interest in the event of the action, has been frequently proposed and discussed in this state. We think the time has come for effecting it.

The rule appears to us to rest upon a principle altogether unsound; that is, that the situation of the witness will tempt him to perjury. The reason strikes at the foundation of human testimony. The only just enquiry is this; whether the

chances of obtaining the truth, are greater from the admission or the exclusion of the witness. Who that has any respect for the society, in which he lives, can doubt, that, upon this principle, the witness should be admitted?

The contrary rule implies, that, in the majority of instances, men are so corrupted by their interest, that they will perjure themselves for it, and that besides being corrupt, they will be so adroit, as to deceive courts and juries. This is contrary to all experience. In the great majority of instances the witnesses are honest, however much interested, and in most cases of dishonesty the falsehood of the testimony is detected, and deceives none.

Absolutely to exclude an interested witness, is therefore as unsound in theory, as it is inconsistent in practice. It is inconsistent, because the law admits witnesses, far more likely to be biased in favor of the party, than he who has merely a pecuniary interest. A father may testify for his son; a child living with his father and dependent upon his bounty, may appear as his witness, nay, as his only witness, without question. Is the immediate gain of a dollar, by the result of a cause, so potent to outweigh integrity, while affection, consanguinity, dependence, are put down as dust in the balance?

There is not another rule in the law of evidence so prolific of disputes, uncertainties, and delays, as that, we are considering. Not a circuit is held, but question after question is raised upon it; nor a term where exceptions growing out of it, are not debated.

Some of the foregoing reasons, apply also to the exclusion of a person, sentenced for felony. It is wiser, we cannot doubt, to place the witness on the stand, and let the jury judge of his testimony.

England has outstripped us in this most necessary reform. Five years ago, an act of parliament obliterated the rule from the laws of that country.

The following is the material part of the act of the English parliament, to which we refer :

AN ACT *for improving the law of evidence.*

22ND AUGUST, 1843.

“Whereas, the enquiry after truth in courts of justice, is often obstructed by incapacities, created by the present laws, and it is desirable, that full information as to the facts in issue, both in criminal, and in civil cases, should be laid before the persons, who are appointed to decide upon them, and that such persons should exercise their judgment, on the credit of the witnesses adduced, and on the truth of their testimony, now therefore, be it enacted, by the Queen’s most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that no person offered as a witness, shall hereafter be excluded, by reason of incapacity from crime or interest, from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil, or criminal, in any court, or before any judge, jury, sheriff and coroner, magistrate, officer, or person having, by law, or by consent of parties, authority to hear, receive, and examine evidence; but that every person, so offered, may and shall be admitted, to give evidence on oath, or solemn affirmation, in those cases wherein affirmation is by law receivable, notwithstanding that such person may or shall have an interest, in the matter in question, or in the event of the trial, or of any issue, matter, question or inquiry, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person, offered as a witness, may have been previously convicted of any crime or offence: Provided that this act shall not render competent any party to any suit, action or proceeding individually named in the record, or any lessor of the plaintiff, or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in replevin may make cognizance, or any person, in whose immediate and individual behalf any action may be brought or defended, either wholly or in part, or the husband or wife of such persons respectively: Provided also,” &c.

This statute is termed Lord Denman's Act, from having originated with the present Chief Justice of England. Lord Brougham has spoken of it, in the following language :

" This is certainly the greatest measure that has been carried under the head of judicial procedure, since the statute of frauds, that is, since the restoration. It places the law of evidence at length upon a rational footing, and makes its provisions consistent with themselves. It protects judges and juries and parties, from the miscarriages, heretofore constantly produced, by the exclusion of important testimony ; wisely opening the door to the witness, but reserving the estimate of his credit and the value of his evidence, to those who are to judge the cause. It also sweeps away the numberless nice and subtle distinctions in which the profession was wont to luxuriate; disencumbers our jurisprudence of a heavy load of useless decisions, resting upon refinements and not principles, and abridges the trial of causes, by shutting out those debates, that used daily to arise upon the admission of proofs, which the common sense of mankind at once pronounced should be received, and which the law itself did receive in other instances, not distinguishable by the naked eye of plain reason. There have been few greater improvements in our judicial system, than those which are effected by this valuable statute."

**§ 353.** No person residing more than one hundred miles from the place of examination, shall be obliged to attend as a witness before any court or judge, except as provided in section 355.

**§ 354.** Whenever either party desires the examination of a witness, who shall reside more than one hundred miles from the place where the trial or hearing is to be had, he may apply to a judge of the court for an order to examine such witness. Whereupon the judge, on due proof to his satisfaction, of the materiality of the witness, may make an order for his examination, at a specified time and place, before the county judge of the coun-

where the examination is to be had, or before a justice of the peace or referee residing therein, to be designated by the judge making the order.

§ 353. A copy of such order shall be forthwith served on the adverse party, and notice of the time and place of examination given according to the provisions of section 374. The examination may thereupon be taken by such county judge, justice of the peace, or referee; and being certified by him to have been written and subscribed in his presence, and sworn to before him, and being filed with the clerk, may be read by either party on any trial or proceeding in the action, if the witness be dead, or do not reside within one hundred miles of the place of trial, or be unable to attend. But the court may, on special application, order either party to produce his witnesses, and any such witness to attend in open court, though residing more than one hundred miles from the place of trial: and after such order is made, the written deposition of any witness so ordered to be produced shall not be read.

§ 356. If any witness served with such order, or an order for his examination out of court, disobey it, he may be punished by the court or judge as for a contempt, and shall be liable to all the penalties to which a witness is liable, who is duly served with process for his attendance at a court, and neglects to attend.

*In cases of equity, the witnesses, before the present constitution, were examined before officers called examiners in chancery, distributed through the State, near the homes of the witnesses. It was a regulation of that practice that no witness should be*

obliged to go more than forty miles to be examined. If all these witnesses are to be taken from their homes to distant counties, to testify at the trial what they would before have testified before the examiners preparatory to the trial, the burthen upon them will prove intolerable.

There should seem, moreover, to be no good reason to require the personal attendance of a witness at so great a sacrifice. No doubt, his appearance upon the stand, where the testimony may be taken from his lips, is preferable to a written deposition, taken at a distance. But that is not the only question. The point is this, whether the increased advantage to the parties of having the judge and jury see the witness, is more than a counterpoise to the increased injury to the witness from being brought so far, and at so great a loss. We think the question can be answered in only one way. In his own county let him be called to the stand. If it be wanted in another, let it be taken in his own, and transmitted thither.

Should there be a really urgent occasion for the personal attendance of the witness, there can be little doubt that the party may be able to induce him to attend, by compensating him for his expenses and time. So it is now, where a witness is wanted from another state; the party makes an arrangement with him to come in many cases where his attendance is important. If a witness in Jersey city be wanted for a trial in New-York, he can generally be induced to attend, though he cannot be compelled to do so. So it will happen, we doubt not, if our plan be adopted. Certain we are, that in any event, the testimony of the witness will not be lost, because we compel him to attend before an officer in his own county, and give the testimony in writing; and that is far better than to compel his attendance against his will, and at whatever sacrifice.

## CHAPTER VIII.

### MOTIONS AND ORDERS.

SECTION 357. An order, what.

358. A motion, what.

359. Motions, how made.

360. Orders how made.

361. Motions to be made in the district, or adjoining county.

362. Orders may be made with or without notice to shew cause.

363. When notice is necessary, it must be served five days before hearing.

364. In actions in supreme court county judge may act.

365. In the absence of judge, motion may be transferred.

366. Time may be enlarged on affidavit.

§357. Every direction of a court or judge, made or entered in writing, and not included in a judgment, is denominated an order.

§ 358. An application for an order is a motion.

§ 359. All motions may be made to the court, at a special term, except upon appeals.

§ 360. Motions may likewise be made to a judge or justice out of court, except for a new trial on the merits.

We are unable to perceive any good reason, against allowing special motions to be heard before a judge at any time, when not otherwise employed. It has been suggested, that courts held for that purpose at stated terms, only in presence of a numerous bar, would be more imposing, and that the judge would feel a higher responsibility, and the dignity of the judicial forum be better secured. There may be something in this of more force than is apparent to us, but we think the advantages of a hearing near the parties, and of a speedier decision outweigh it.

§ 361. Motions must be made within the district in which the action is triable, or in a county adjoining that in which it is triable, except that where the action is triable in the first judicial district, the motion must be made therein.

§ 362. Orders may be made upon or without notice, on an order to shew cause, according to the existing practice, except as otherwise provided in this act. No order to stay proceedings for a longer time than ten days shall be granted by a judge out of court, except upon previous notice to the adverse party.  
~~be served five days before the time appointed for the~~  
 hearing; but the court or judge may, by an order to show cause, prescribe a shorter time.

§ 364. In an action in the supreme court, a county judge, in addition to the powers conferred upon him by this act, may exercise, within his county, the powers of a judge out of court, according to the existing practice, except as otherwise provided in this act. And in all cases where an order is made by a county judge, it may be reviewed in the same manner, as if it had been made by a judge of the court.

§ 365. When notice of a motion is given, or an order to show cause is returnable, before a judge out of court, and at the time fixed for the motion, he is absent, or unable to hear it, the same may be transferred, by his order, (or if no order be made, by a notice, from either party to the other, of not less than five days,)

to some other judge, before whom the motion might originally have been made, as provided in section 361.

§ 366. The time within which any proceeding in an action must be had, after its commencement, and before judgment, except the time within which an appeal must be taken, may be enlarged, upon an affidavit shewing grounds therefor, by a judge of the court, or if the action be in the supreme court, by a county judge. The affidavit, or a copy thereof must be served with a copy of the order, or the order may be disregarded.

## CHAPTER IX.

### ENTITLING AFFIDAVITS.

#### Sec. 367. Affidavits defective entitled, valid.

§ 367. It shall not be necessary to entitle an affidavit in the action; but an affidavit made without a title, or with a defective title, shall be as valid and effectual for every purpose, as if it were duly entitled, if it intelligibly refer to the action or proceeding in which it is made.

This section is intended to obviate an objection often made upon motions, that an affidavit is incorrectly entitled, and therefore should not be received. Thus it is said, that if the affidavit to hold to bail be entitled in the suit which is to be commenced, it is bad, because there is no suit pending till the service of the writ. There should seem to be no good reason, for requiring more than that the affidavit should refer to the action, so that it cannot be mistaken.

## CHAPTER X.

### COMPUTATION OF TIME.

#### Sec. 368. Time how computed.

§ 368. The time within which an act is to be done, as herein provided, shall be computed, by excluding the first day and including the last. If the last day be Sunday, it shall be excluded.

## CHAPTER XI.

### NOTICES, AND FILING AND SERVICE OF PAPERS.

- SECTION 369. } Notices, how served.  
 370. }  
 371. } When and how served by mail.  
 372. }  
 373. } Notice when party served resides within fifty miles, &c.  
 374. }  
 375. Where defendant has not answered, papers need not be served on him  
 376. Where party resides out of state, service may be on clerk.  
 377. Summons and pleadings to be filed within ten days after service.  
 378. Where party appears by attorney, service to be on the attorney.  
 379. Provisions of this chapter not to apply to process for contempt &c.

§ 369. Notices shall be in writing; and notices and other papers may be served on the party or attorney, in the manner prescribed in the next three sections, where not otherwise provided by this act.

§ 370. The service may be personal, by delivery to the party <sup>or attorney</sup> on whom the service is required to be made, or it may be as follows:

1. If, upon an attorney, it may be made, during his absence from his office, by leaving the paper with his clerk therein, or with a person having charge thereof; or when there is no person in the office, by leaving it,

between the hours of six in the morning and nine in the evening, in a conspicuous place in the office, or if it be not open, so as to admit of such service, then by leaving it at the attorney's residence, with some person of suitable age and discretion.

2. If upon a party, it may be made, by leaving the paper at his residence, between the hours of six in the morning and nine in the evening, with some person of suitable age and discretion.

§ 371. Service by mail may be made, where the person making the service and the person on whom it is to be made, reside in different places, between which there is a regular communication by mail.

§ 372. In case of service by mail, the paper must be deposited in the post-office, addressed to the person on whom it is to be served, at his place of residence, and the postage paid.

§ 373. Where a paper is served by mail it shall be double the time required in cases of personal service.

§ 374. Notice of a motion, or other proceeding, before a court or judge, when personally served, shall be given at least five days before the time appointed therefor, if the person to be served reside within fifty miles of the place where the hearing is to be had, and for every additional fifty miles, one day shall be added to the time of notice.

ing is to be had, and for every additional fifty miles, one day shall be added to the time of notice.

§ 375. Where a defendant shall not have answered, service of notices or papers, in the ordinary proceedings in an action, need not be made upon him, unless he be imprisoned for want of bail.

§ 376. Where a plaintiff, or a defendant who has demurred or answered, resides out of the state or has no attorney in the action, the service may be made on the clerk, for the party.

§ 377. The summons, and the several pleadings in an action, shall be filed with the clerk within ten days after the service thereof, respectively, or the adverse party, on proof of the omission, shall be entitled, without notice, to an order from a judge that the same be filed within a time to be specified in the order, or be deemed abandoned.

§ 378. Where a party shall have an attorney in the action, the service of papers shall be made upon the attorney, instead of the party.

§ 379. The provisions of this chapter shall not apply to the service of a summons, or other process, or of any paper to bring a party into contempt.

## CHAPTER XII.

### DUTIES OF SHERIFFS AND CORONERS.

SECTION 380. Duty of sheriff and coroner in serving or executing process, &c.

§ 380. Whenever, pursuant to this act, the sheriff may be required to serve or execute any summons or order, or to do any other act, he shall be bound to do so, in like manner as upon process issued to him, and shall be equally liable in all respects for neglect of duty; and if the sheriff be a party, the coroner shall be bound to perform the service, as he is now bound to execute process, where the sheriff is a party

## CHAPTER XIII.

### ACCOUNTABILITY OF GUARDIANS.

SECTION 381. Guardian not to receive property until security is given.

§ 381. No guardian, appointed for an infant, shall be permitted to receive property of the infant, until he shall have given sufficient security, approved by a judge of the court or a county judge, to account for and apply the same, under the direction of the court.

## CHAPTER XIV.

### POWERS OF REFEREES.

SECTION 381. Referees authorized to administer oaths, &c.

§ 382. Every referee, appointed pursuant to this act shall have power to administer oaths, in any proceeding before him, and shall have generally the powers now vested in a referee by law.

## CHAPTER XV.

### GENERAL PROVISIONS.

SECTION 383. Definition of "real property."

384. Definition of "personal property."

385. Definition of "property."

386. Definition of "district."

387. Definition of "clerk."

388. Statutory provisions inconsistent with this act repealed.

389. Rules and practice inconsistent with this act repealed.

390. This act not to affect certain provisions.

391. This act, when to take effect.

§ 383. The words "real property," as used in this act, are co-extensive with lands, tenements and hereditaments.

§ 384. The words "personal property," as used in this act, include money, goods, chattels, things in action, and evidences of debt.

§ 385. The word "property," as used in this act, includes property real and personal.

§ 386. The word "district," as used in this act, signifies judicial district, except when otherwise specified.

§ 387. The word "clerk," as used in this act, signifies the clerk of the court where the action is pending, and in the supreme court, the clerk in the county mentioned in the title of the complaint, or in another county to which the court may have changed the place of trial, unless otherwise specified.

*owl*  
 § ~~388~~ All statutory provisions, inconsistent with this act, are repealed, but this repeal shall not revive a statute, or law, which may have been repealed, or abolished, by the provisions hereby repealed.

*owl*  
 § ~~389~~ The present rules and practice of the courts, in civil actions, inconsistent with this act, are abrogated; but where consistent with this act, they shall continue, until the further action of the legislature.

*owl*  
 § ~~389~~ Until the legislature shall otherwise provide, this act shall not affect proceedings upon mandamus, prohibition, quo warranto, scire facias to repeal letters patent, nor any proceedings provided for by the second, third, fourth, fifth, sixth and eighth titles of chapter five, of the third part of the Revised Statutes, or by chapter eight of the same part, excluding the second and twelfth titles thereof; except that, when, in the course of any such proceedings, or in consequence thereof, a civil action shall be brought, such action shall be conducted in conformity to this act; and except, also, where any particular provision of the titles and chapters enumerated in this title, shall be plainly inconsistent with this act, such provision shall be deemed repealed.

*owl*  
 § ~~391~~ This act shall take effect on the first day of May next; except that sections 23, 24, 25, 26 and 27, shall take effect immediately.

## APPENDIX A.

### SCHEDULE OF FORMS.

#### SUMMONS.

To C——. D——.

You are hereby summoned to answer the complaint of A—— B——, of which a copy is hereto annexed, and to serve a copy of your answer on me at *the city of Albany*, within twenty days after the service of this summons, exclusive of the day of service, or [the plaintiff will take judgment against you for \$        with interest from the first day of January, 1848.]

A. B., *Ptff.*

or  
E. F., *Ptff's Atty.*

*Albany, February 1, 1848.*

Or, if the action do not arise on contract for the recovery of money only, the following, instead of the part in brackets: [the plaintiff will apply to the next special term of the court, at the        on the        day of        for the relief demanded in the complaint.]

#### COMPLAINT.

SUPREME COURT  
*County of Albany,*  
A. B.  
*agt.*  
C. D. }

A—— B——, plaintiff, complains;  
that C—— D——, defendant, on the        day of        A. D. at  
by his promissory note in writing, for value received, promised to  
pay the plaintiff \$1000, in thirty days thereafter, and that he has not

paid the same: whereupon the plaintiff demands judgment against the defendant for the \$1000, with interest from the       day of

A. B. *Plff.*

or

E. F. *Plff's Atty.*

*County of Albany.* A. B. being sworn saith, that he believes the foregoing complaint to be true.

A. B.

Sworn this 1st day of Februry, }  
1848, before me.

J. P. *Comr' of deeds.*

N. B.—We have prepared these forms, by way of illustration merely, thinking it better not to make them part of the act, but to leave the parties to devise the best and simplest forms for themselves. It will be seen that in the title, we have placed the plaintiff's name first in all cases, whether the pleading be on the defendant's part or the plaintiff's. This we think most convenient.

### SUMMONS.

To C. D.—

You are hereby summoned to answer the complaint of A. B., of which a copy is hereto annexed, and serve a copy of your answer on me at the city of Albany, within twenty days after the service of this summons, exclusive of the day of service, or the plaintiff will take judgment against you for \$1000 with interest from the       day of  
A. D.,

A. B., *Plff.*

or

E. F., *Plff's Att'y.*

*Albany, February 1, 1848.*

*County of Albany.* G. H., of the city of Albany, being sworn, saith, that on the second day of February, at that city, he served personally on C. D., the defendant, a summons of which the foregoing is a copy, together with a copy of the complaint therein mentioned.

G. H.

Sworn this 2d day of February, }  
A. D., 1848, before me.

T. P., *Comr' of Deeds.*

**JUDGMENT ROLL ON FAILURE TO ANSWER.**

**SUPREME COURT,**  
*County of Albany,*  
**A. B.**  
*agt.*  
**C. D.**

A. B., plaintiff, complains;  
that C. D., defendant, on the                day          of          A.D.  
                    , at                      by his promissory note in writ-  
ting, for value received, promised to pay the plaintiff \$1000, in thirty  
days thereafter, and that he has not paid the same: whereupon the  
plaintiff demands judgment against the defendant for the \$1000, with  
interest from the                day of

JANUARY 1896.

A. B., *Plf.*,  
or  
E. F., *Plf.'s Atty.*

*County of Albany.* A. B. being sworn, saith that he believes the foregoing complaint to be true.

**A B**

Sworn this 1st day of February, }  
A. D. 1848, before me. }

T. P., *Com'r of Deeds.*

**SUPREME COURT.**

A — B — ,  
C — D — . } *agt.*

*County of Albany.* E—F—, plaintiff's attorney in this cause, being sworn, saith, that no copy of an answer to the complaint has been served on him.

**E. F.**

Sworn this 23d day of February, }  
A. D., 1848, before me. }

SUPREME COURT, } Judgment,  
A. B., }  
agt. } February 23, 1848.  
C. D. }

The summons, with a copy of the complaint in this action, having been personally served on the defendant, on the first day of February, A. D. 1848, and no copy of an answer to the complaint having been served on the plaintiff's attorney, as required by the summons, now, on motion of E. F., plaintiff's attorney, it is hereby adjudged that the plaintiff, recover of the defendant, the sum of \$ with \$ costs.

## JUDGMENT ROLL ON ISSUE OF FACT

[Same as above to the end of the summons.]

## ANSWER.

SUPREME COURT, }  
 A. B. }  
*agt.* }  
 C. D. }

C. D., the defendant, answers to the complaint  
 that on the            day of            he paid the note mentioned in  
 the complaint.

C. D., *Def't.*

or

L. M., *Def't's Att'y.*

*County of Albany.* C. D., being sworn saith, that he believes the fore-  
 going answer to be true.

C. D.

Sworn this 4th day of February, }  
 1848, before me. }

T. P., *Com'r of Deeds.*

SUPREME COURT,  
 A— B—, }  
*agt.* }  
 C— D—, }

*County of Albany.* At a circuit court, held in this county, on the 15th  
 day of February, A. D. 1848, before S. T., justice, the jury  
 found a verdict on the issue for the plaintiff, for the sum of  
 \$

O. P., *Clerk.*

SUPREME COURT, }  
 A. B. } Judgment,  
*agt.* } *February 15, 1848.*  
 C. D. }

This cause being at issue upon the facts, and a trial by jury had, on  
 which a verdict was found for the plaintiff for \$           , now, on motion  
 of E. F., plaintiff's attorney, it is hereby adjudged, that the  
 plaintiff, recover of            the defendant, the sum of \$           , with  
 \$            costs.

## COMPLAINTS.

## INDORSEE AGAINST MAKER ON NOTE.

That the defendant on        at        , by his note in writing for value received, promised one G. H. to pay him or his order        dollars in        months from that day; that G. H. endorsed the note to the plaintiff, yet that the defendant has not paid the same, &c.

## OR

That the defendant signed a note, of which a copy is hereto annexed, that the payee endorsed it to the plaintiff, yet that the defendant has not paid the same.

## INDORSEE AGAINST INDORSER ON NOTE.

That one G. H. on        at        , by his note in writing for value received, promised the defendant to pay him or his order        dollars in        months from that day; that the defendant endorsed the note to the plaintiff; that when it became due, it was presented to G. H. for payment, but that he refused to pay it, and that notice thereof was thereupon given to the defendant; yet that the defendant has not paid the same, &c.

## OR

That one G. H. signed a note, of which a copy is hereto annexed, that the defendant endorsed it to the plaintiff, that when it became due it was presented to G. H. for payment, but that he refused to pay it, and that notice thereof was thereupon given to the defendant; yet that he has not paid the same, &c.

## PAYEE AGAINST ACCEPTOR, ON A FOREIGN BILL OF EXCHANGE.

That one G. H. at Liverpool, in England, on        made his bill of exchange in writing, and directed the same to the defendant, at the City of New-York, and thereby required the defendant in        days after sight of that his first of exchange, (the second and third of the same tenor and date not paid,) to pay to the plaintiff        dollars for value received, that the defendant on        accepted the bill; yet that he has not paid the same.

Complaint by payee against drawer, and by indorsee against drawer, acceptor and indorser, may be drawn in a similar manner.

## ON A POLICY OF INSURANCE.

That on            the defendants signed a policy of insurance, of which a copy is hereto annexed ; that the plaintiff was then the owner of the vessel therein mentioned, and continued such owner until her loss ; that the vessel while proceeding on the voyage described in the policy, was totally lost by the perils of the seas ; that the plaintiff's loss, by reason thereof, was            dollars ; that on            he furnished the defendants with proof of the loss and of the plaintiff's interest ; yet that the defendants have not paid any part of such loss.

## OR THIS.

That on            the plaintiff was the owner of the ship            then lying in the port of New-York ; that the defendants, in consideration of a premium therefor paid to them by the plaintiff, made a policy of insurance upon the ship for a voyage from New-York to Cadiz, in Spain, and at and from Cadiz to her port of discharge in the United States, and thereby promised to insure for the plaintiff            dollars upon the ship for the voyage, against the perils of the seas and other perils in the policy mentioned. And the plaintiff avers, that the ship, on            sailed from New-York on the voyage described in the policy, and while proceeding thereon was, by the perils of the seas, wrecked and totally lost, of which the defendants on            had notice ; yet that they have never paid any part of such sum.

## ON A COVENANT.

That on            the defendant executed, under his hand and seal, an instrument in writing, of which a copy is hereto annexed ; that the plaintiff has complied with all its provisions on his part, but that the defendant has not complied with the following provision thereof, viz :

## FOR ASSAULT AND BATTERY.

That the defendant at            , on            , assaulted and beat the plaintiff: wherefore the plaintiff demands judgment against the defendant for the injury, and that the defendant may be adjudged, to make to the plaintiff compensation in damages therefor, to the amount of \$

**FOR TRESPASS IN TAKING GOODS.**

That on \_\_\_\_\_, at \_\_\_\_\_, the defendant without leave, and wrongfully, took the following property of the plaintiff, viz:

\_\_\_\_\_

**FOR TRESPASS IN ENTERING UPON LAND.**

That on \_\_\_\_\_, at \_\_\_\_\_, the defendant without leave, and wrongfully, entered a lot of land, of which the plaintiff is the owner in fee (or if he have a lesser estate describe it) situated at \_\_\_\_\_, and broke up the ground, &c.

\_\_\_\_\_

**FOR LIBEL.**

That the defendant being the proprietor (printer or publisher) of a newspaper published in the \_\_\_\_\_, called the \_\_\_\_\_, the following libel concerning the plaintiff was on \_\_\_\_\_ published therein, viz:

**OR**

That the defendant on the \_\_\_\_\_ at \_\_\_\_\_ published the following libel concerning the plaintiff, viz:

\_\_\_\_\_

**FOR SPECIFIC RELIEF ON ACCOUNT OF BREACH OF TRUST.**

A— B—, complains;  
that C— D—, did on the \_\_\_\_\_ day of \_\_\_\_\_  
A. D. \_\_\_\_\_ by an instrument then duly executed by all the parties therein named, of which a copy is hereto annexed, take upon himself the execution of the trusts therein mentioned, and has nevertheless committed the following breaches of trust. \* \* \*

Wherefore the plaintiff demands, that the defendant may be restrained by injunction from any further disposition of the trust property, compelled to render to the plaintiff, compensation in damages for the breaches of trust, removed from the trust, and another trustee appointed in his place Dated \_\_\_\_\_

## ANSWERS.

## TO COMPLAINT ON NOTE.

SUPREME COURT,  
County of Albany, }  
A— B—,  
    agt.  
C— D—.

C— D—, defendant, answers to the complaint,  
That he did not sign the note mentioned in the complaint.

C— D—, *Def't.*

or  
L— M—, *Def't's Att'y.*

County of Albany. C— D— being sworn, saith, that he believes  
the foregoing answer to be true.

C— D—.

Sworn this        day of  
A. D.        , before me.

T. P., *Com'r of Deeds.*

That on the        day of        , he paid the note mention-  
ed in the complaint.

That the note was not presented to G. H. for payment, as is alleged  
in the complaint.

## ON INSURANCE.

That the ship was not lost by the perils of the seas, as is alleged in  
the complaint.

OR

That the plaintiff did not comply with the following conditions of  
insurance, viz:

OR

That the vessel was unseaworthy when she sailed on the voyage men-  
tioned in the complaint.

## ON COVENANT.

That the defendant did comply with the provision in the agreement  
set forth in the complaint, therein alleged not to have been complied  
with by him.

FOR ASSAULT AND BATTERY.

That he did not assault or beat the plaintiff, as is alleged in the complaint.

FOR TRESPASS IN TAKING GOODS.

That he did not take the property mentioned in the complaint.

OR

That the property mentioned in the complaint was not the property of the plaintiff.

FOR TRESPASS IN ENTERING UPON LAND.

That he did not enter the lot of land mentioned in the complaint.

FOR LIBEL.

That the charge published, as alleged in the complaint, was true in all its parts.

REPLY.

SUPREME COURT,  
County of Albany:

A— B—, }  
agt.  
C— D—. }

The plaintiff, A— B—, replies to the answer of C— D—, That the defendant did not pay the note mentioned in the complaint, as he has alleged in his answer.

A. B. *Piff.*

or

E. F. *Piff's Atty.*

County of Albany. A— B—, being duly sworn, saith, that he believes the foregoing reply to be true.

A. B.

Sworn this      day of      }  
A. D.      before me.      }  
T. P. *Com of Deeds.*

# **DENURRER.**

A — B — , }  
           *agt.*  
 C — D — . }

The defendant demurs to the complaint, for the following grounds of objection, viz:

First —

Second — \* \* \*

C — D — , *Def't.*

or

E — F — , *Def't's Att'y.*

# **ORDER OF ARREST.**

A — B — , }  
           *agt.*  
 C — D — . }

To the sheriff of the county of Albany:—

You are hereby required, forthwith to arrest the defendant, and hold him to bail in the sum of \$            and to return this order to (the plaintiff or attorney subscribing or endorsing the order,) at ———, on the       day of       A. D.

*Albany, February 2, 1848.*

J. W., *Justice of the supreme court,*

or

E. W., *County judge of the county of Albany.*

# **UNDERTAKING ON THE PART OF THE PLAINTIFF.**

A — B — , }  
           *agl.*  
 C — D — . }

Whereas, application has been made to J. W., justice of the supreme court, for an order to arrest the defendant in this cause, we do hereby undertake, that if the defendant recover judgment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding \$

*Albany, February 2, 1848*

## UNDERTAKING OF THE BAIL.

A— B—, }  
           *agt.*  
 C— D—. }

The defendant having been arrested by the sheriff of the county of \_\_\_\_\_ upon an order of arrest in this cause, granted by \_\_\_\_\_ we, A. W., of \_\_\_\_\_ farmer, and E. W., of \_\_\_\_\_ merchant, hereby undertake, in the sum of \$ \_\_\_\_\_ that the defendant shall at all times render himself amenable to the process of the court, during the pendency of this action, and to such as may be issued to enforce the judgment therein.

## NOTICE TO SHERIFF TO DELIVER PERSONAL PROPERTY

A— B—, }  
           *agt.*  
 C— D—. }

*To be endorsed on the affidavit.*

*To the sheriff of the county of Albany:*

You are hereby required to take from the defendant the property described in the within affidavit, and deliver it to the plaintiff.

*Albany, February 2, 1848.*

A— B—, *Plff,*

or

E— F—, *Plffs Att'y.*

## INJUNCTION.

A— B—, }  
           *agt.*  
 C— D—. }

It appearing satisfactorily to me, by the affidavit of \_\_\_\_\_ that sufficient grounds therefor exist, I do hereby order, that the defendant desist (or refrain) from \_\_\_\_\_ until the further order of the court.

*Albany, February 2, 1848.*

*J. W., Justice of the supreme court.*

or

*E. W., County judge of the county of Albany*



## APPENDIX B.

### TABLE

Showing the number of courts held for the trial of civil actions in the several counties under the old constitution, and under the act of 1847; and the number of united circuits and special terms, as proposed by this act, excluding local courts of cities.

| NAMES OF COUNTIES<br>AND DISTRICTS.   | Population. | Under old Const. |             |                       |              | Under act of 1847. |                        |                               |                       |                        | Proposed No. of<br>trial courts. |
|---------------------------------------|-------------|------------------|-------------|-----------------------|--------------|--------------------|------------------------|-------------------------------|-----------------------|------------------------|----------------------------------|
|                                       |             | Circuits.        | Com. pleas. | Total jury<br>courts. | Spec'l terms | Circuits.          | Jury county<br>courts. | Total cir. &<br>spec'l terms. | Total jury<br>courts. | Total trial<br>courts. |                                  |
| <i>First District.</i>                |             |                  |             |                       |              |                    |                        |                               |                       |                        |                                  |
| City and county of New<br>York, ..... | 371,223     | 5                | 12          | 17                    | 11           | 10                 | 12                     | 21                            | 22                    | 33                     | 11                               |
| <i>Second District.</i>               |             |                  |             |                       |              |                    |                        |                               |                       |                        |                                  |
| Richmond, .....                       | 13,673      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Suffolk, .....                        | 34,579      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Queens, .....                         | 31,849      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Kings, .....                          | 78,491      | 3                | 4           | 7                     | 3            | 3                  | 4                      | 6                             | 7                     | 10                     | 6                                |
| Westchester, .....                    | 47,578      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Orange, .....                         | 52,227      | 2                | 4           | 6                     | 2            | 2                  | 4                      | 4                             | 6                     | 8                      | 4                                |
| Rockland, .....                       | 13,741      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Putnam, .....                         | 13,258      | 2                | 2           | 4                     | 2            | 2                  | 2                      | 4                             | 4                     | 6                      | 3                                |
| Dutchess, .....                       | 55,124      | 2                | 3           | 5                     | 4            | 2                  | 5                      | 6                             | 7                     | 11                     | 4                                |
|                                       |             | 19               | 28          | 47                    | 21           | 19                 | 30                     | 40                            | 49                    | 70                     | 34                               |
| <i>Third District.</i>                |             |                  |             |                       |              |                    |                        |                               |                       |                        |                                  |
| Columbia, .....                       | 41,476      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Sullivan, .....                       | 18,727      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Ulster, .....                         | 48,907      | 2                | 3           | 5                     | 2            | 2                  | 4                      | 4                             | 6                     | 8                      | 4                                |
| Greene, .....                         | 31,957      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Albany, .....                         | 77,268      | 2                | 4           | 6                     | 5            | 2                  | 4                      | 7                             | 6                     | 11                     | 6                                |
| Schoharie, .....                      | 32,488      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Rensselaer, .....                     | 62,338      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 5                                |
|                                       |             | 14               | 22          | 36                    | 17           | 14                 | 23                     | 31                            | 37                    | 54                     | 28                               |
| <i>Fourth District.</i>               |             |                  |             |                       |              |                    |                        |                               |                       |                        |                                  |
| Warren, .....                         | 14,908      | 2                | 2           | 4                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Saratoga, .....                       | 41,477      | 2                | 3           | 5                     | 2            | 2                  | 4                      | 4                             | 6                     | 8                      | 4                                |
| Washington, .....                     | 40,554      | 2                | 4           | 6                     | 2            | 2                  | 4                      | 4                             | 6                     | 8                      | 4                                |
| Essex, .....                          | 25,102      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Franklin, .....                       | 18,692      | 2                | 2           | 4                     | 2            | 2                  | 2                      | 4                             | 4                     | 6                      | 3                                |
| St. Lawrence, .....                   | 62,354      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 5                                |
| Clinton, .....                        | 31,278      | 2                | 2           | 4                     | 2            | 2                  | 2                      | 4                             | 4                     | 6                      | 3                                |
| Montgomery, .....                     | 29,643      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Fulton with Hamilton,                 | 20,461      | 2                | 6           | 8                     | 2            | 2                  | 6                      | 4                             | 8                     | 10                     | 3                                |
| Schenectady, .....                    | 16,631      | 2                | 3           | 5                     | 2            | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
|                                       |             | 20               | 31          | 51                    | 20           | 20                 | 33                     | 40                            | 53                    | 73                     | 34                               |

TABLE.—CONTINUED.

| NAMES OF COUNTIES<br>AND DISTRICTS. | Population. | Under old Const. |             |                       |               | Under act of 1847. |                        |                               |                       |                        | Proposed No. of<br>trial causes. |
|-------------------------------------|-------------|------------------|-------------|-----------------------|---------------|--------------------|------------------------|-------------------------------|-----------------------|------------------------|----------------------------------|
|                                     |             | Circuits.        | Com. Pleas. | Total jury<br>courts. | Spec'l terms. | Circuits.          | Jury County<br>courts. | Total cir. &<br>Spec'l terms. | Total jury<br>courts. | Total trial<br>courts. |                                  |
| <i>Fifth District.</i>              |             |                  |             |                       |               |                    |                        |                               |                       |                        |                                  |
| Oneida, .....                       | 70,175      | 2                | 4           | 6                     | 4             | 2                  | 4                      | 6                             | 6                     | 10                     | 5                                |
| Oneida, .....                       | 84,776      | 2                | 4           | 6                     | 4             | 2                  | 4                      | 6                             | 6                     | 10                     | 6                                |
| Oswego, .....                       | 48,441      | 2                | 4           | 6                     | 4             | 2                  | 4                      | 6                             | 6                     | 10                     | 4                                |
| Herkimer, .....                     | 37,424      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Jefferson, .....                    | 64,999      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 5                                |
| Lewis, .....                        | 20,218      | 2                | 2           | 4                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
|                                     |             | 12               | 20          | 32                    | 18            | 12                 | 21                     | 30                            | 33                    | 51                     | 27                               |
| <i>Sixth District.</i>              |             |                  |             |                       |               |                    |                        |                               |                       |                        |                                  |
| Otsego, .....                       | 50,569      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Delaware, .....                     | 36,990      | 2                | 4           | 6                     | 2             | 2                  | 4                      | 4                             | 6                     | 8                      | 4                                |
| Madison, .....                      | 40,887      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Chenango, .....                     | 39,900      | 2                | 4           | 6                     | 2             | 2                  | 4                      | 4                             | 6                     | 8                      | 4                                |
| Broome, .....                       | 25,698      | 2                | 2           | 4                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Tioga, .....                        | 22,456      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Chemung, .....                      | 23,689      | 2                | 4           | 6                     | 2             | 2                  | 4                      | 4                             | 6                     | 8                      | 3                                |
| Tompkins, .....                     | 33,168      | 2                | 4           | 6                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Cortland, .....                     | 28,081      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
|                                     |             | 18               | 30          | 48                    | 18            | 18                 | 30                     | 36                            | 48                    | 66                     | 32                               |
| <i>Seventh District.</i>            |             |                  |             |                       |               |                    |                        |                               |                       |                        |                                  |
| Livingston, .....                   | 33,193      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Wayne, .....                        | 42,515      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Seneca, .....                       | 24,972      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Yates, .....                        | 20,777      | 2                | 4           | 6                     | 2             | 2                  | 4                      | 4                             | 6                     | 8                      | 3                                |
| Ontario, .....                      | 42,592      | 2                | 4           | 6                     | 2             | 2                  | 4                      | 4                             | 6                     | 8                      | 4                                |
| Steuben, .....                      | 51,699      | 2                | 4           | 6                     | 2             | 2                  | 4                      | 4                             | 6                     | 8                      | 4                                |
| Monroe, .....                       | 70,899      | 2                | 4           | 6                     | 6             | 3                  | 4                      | 9                             | 7                     | 13                     | 6                                |
| Cayuga, .....                       | 49,663      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
|                                     |             | 16               | 28          | 44                    | 20            | 17                 | 28                     | 37                            | 45                    | 65                     | 31                               |
| <i>Eighth District.</i>             |             |                  |             |                       |               |                    |                        |                               |                       |                        |                                  |
| Chautauque, .....                   | 46,548      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Cattaraugus, .....                  | 30,169      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Orleans, .....                      | 25,845      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Niagara, .....                      | 34,550      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Genesee, .....                      | 31,957      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Allegany, .....                     | 40,080      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 4                                |
| Wyoming, .....                      | 27,205      | 2                | 3           | 5                     | 2             | 2                  | 3                      | 4                             | 5                     | 7                      | 3                                |
| Erie, .....                         | 78,635      | 2                | 3           | 5                     | 6             | 2                  | 3                      | 8                             | 5                     | 11                     | 6                                |
|                                     |             | 16               | 24          | 40                    | 20            | 16                 | 24                     | 36                            | 40                    | 60                     | 30                               |
| <b>RECAPITULATION.</b>              |             |                  |             |                       |               |                    |                        |                               |                       |                        |                                  |
| First District, .....               |             | 5                | 12          | 17                    | 11            | 10                 | 12                     | 21                            | 22                    | 33                     | 11                               |
| Second do .....                     |             | 19               | 28          | 47                    | 21            | 19                 | 30                     | 40                            | 49                    | 70                     | 34                               |
| Third do .....                      |             | 14               | 22          | 36                    | 17            | 14                 | 23                     | 31                            | 37                    | 54                     | 26                               |
| Fourth do .....                     |             | 20               | 31          | 51                    | 20            | 20                 | 33                     | 40                            | 53                    | 73                     | 34                               |
| Fifth do .....                      |             | 12               | 20          | 32                    | 18            | 12                 | 21                     | 30                            | 33                    | 51                     | 27                               |
| Sixth do .....                      |             | 18               | 30          | 48                    | 18            | 18                 | 30                     | 36                            | 48                    | 66                     | 32                               |
| Seventh do .....                    |             | 16               | 28          | 44                    | 20            | 17                 | 28                     | 37                            | 45                    | 65                     | 31                               |
| Eighth do .....                     |             | 16               | 24          | 40                    | 20            | 16                 | 24                     | 36                            | 40                    | 60                     | 30                               |
|                                     |             | 120              | 195         | 315                   | 145           | 126                | 203                    | 271                           | 329                   | 474                    | 227                              |

By the existing laws, the number of circuits and special terms in the several counties, is determined by the judges of the supreme court, not to be less than two circuits, and two special terms in each county in a year. The above table shews the number of those courts, as established by the judges for the several counties for the year 1848. With the exception of the cities, (and of Syracuse and Oswego, about to become cities,) they have established the smallest number of each of these courts, allowed by law, in each county of the state; hence it will be seen, that the number of courts is now virtually fixed by law. The county court judges also determine the number of terms to be held by them respectively, and designate so many of them as they may deem necessary for jury terms, not less, however, than the number of jury courts as established by law for the late common pleas. Whether the number of jury courts has been increased, we have no means of knowing, but it could not be diminished. It was therefore safe, for the purposes of the above table, to take the number of jury county courts under the old system, as within the limits, and in that way it has been compiled.

As the law now stands, equity cases are triable at a special term before a single judge, and actions at law are triable at a circuit court, to be held at a time distinct from the special term, before a single judge. Actions, both at law and equity, are triable at courts of common pleas, (now called county courts,) at other distinct terms.

The whole number of these courts required to be held in the state, in a year, including common pleas of New-York city,) is 474.

We propose to combine these trial courts, and to have the circuits and special terms held at the same times, before the same judges, and to require the issues in ordinary actions now triable in the county courts, to be also tried at the same circuits, and by this means, to reduce the whole number of trial courts in the state, from 474 to 227.

We, however, require the county courts to hold six terms a year; but without a jury, except, when in a special proceeding, a jury shall become necessary. These cases are of such rare occurrence, that it was deemed best to allow a special jury, to be summoned in analogy to the present practice in cases of insolvency, lunacy, &c.





